9-6.000 RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS -- 18 U.S.C. §§ 3141 ET SEQ.

9-6.100 Introduction
9-6.200 Pretrial Disclosure of Witness Identity

9-6.100 Introduction

The release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The Bail Reform Act of 1984 provides procedures to detain a dangerous offender, as well as an offender who is likely to flee pending trial or appeal. *See United States v. Salerno*, 481 U.S. 739 (1987).

For a discussion of the provisions of the Bail Reform Act of 1984 (18 U.S.C §§ 3141 *et seq.*) and related case law *see* the Criminal Resource Manual at 26.

9-6.200 Pretrial Disclosure of Witness Identity

Insuring the safety and cooperativeness of prospective witnesses, and safeguarding the judicial process from undue influence, are among the highest priorities of federal prosecutors. *See* the Victim and Witness Protection Act of 1982, P.L. 97-291, § 2, 96 Stat. 1248-9. The Attorney General Guidelines for Victim Witness Assistance 2000 provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of Procedure 16, any local rules, customs or court orders, or special prosecutorial need.

Therefore, it is the Department's position that pretrial disclosure of a witness' identity or statement should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice. Factors relevant to the possibility of witness intimidation or obstruction of justice include, but are not limited to, the types of charges pending against the defendant, any record or information about the propensity of the defendant or the defendant's confederates to engage in witness intimidation or obstruction of justice, and any threats directed by the defendant or others against the witness. In addition, pretrial disclosure of a witness' identity or statements should not ordinarily be made against the known wishes of any witness.

However, pretrial disclosure of the identity or statements of a government witness may often

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promote the prompt and just resolution of the case. Such disclosure may enhance the prospects that the defendant will plead guilty or lead to the initiation of plea negotiations; in the event the defendant goes to trial, such disclosure may expedite the conduct of the trial by eliminating the need for a continuance.

Accordingly, with respect to prosecutions in federal court, a prosecutor should give careful consideration, as to each prospective witness, whether absent any indication of potential adverse consequences of the kind mentioned above reason exists to disclose such witness' identity prior to trial. It should be borne in mind that a decision by the prosecutor to disclose pretrial the identity of potential government witnesses may be conditioned upon the defendant's making reciprocal disclosure as to the identity of the potential defense witnesses. Similarly, when appropriate in light of the facts and circumstances of the case, a prosecutor may determine to disclose only the identity, but not the current address or whereabouts of a witness.

Prosecutors should be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order under 18 U.S.C. § 1514 prohibiting harassment of a victim or witness.

In sum, whether or not to disclose the identity of a witness prior to trial is committed to the discretion of the federal prosecutor, and that discretion should be exercised on a case-by-case, and witness-by-witness basis. Considerations of witness safety and willingness to cooperate, and the integrity of the judicial process are paramount.

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Chapter 7

Bail and Detention Issues

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I. The Bail Reform Act of 1984

All things relating to bail in federal prosecutions are governed by the Bail Reform Act of 1984 (Act or 1984 Act). In *Reno v. Koray*, 515 U.S. 50 (1995), the Supreme Court explained:

> The Bail Reform Act of 1984 provides a federal court with two choices when dealing with a criminal defendant who has been "charged with an offense" and is awaiting trial, 18 U.S.C. § 3142(a), or who "has been found guilty of an offense and . . . is awaiting imposition or execution of sentence," 18 U.S.C. § 3143(a)(1) (1988 ed., Supp. V). The court may either (1) "release" the defendant on bail or (2) order him "detained" without bail. A court may "release" a defendant subject to a variety of restrictive conditions, including residence in a community treatment center. *See* §§ 3142(c)(1)(B)(i), (x), and (xiv). If, however, the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," § 3142(e), the court "shall order the detention of the person," *ibid.*, by issuing a "detention order" "direct[ing] that the person be committed to the custody of the Attorney General for confinement in a corrections facility," § 3142(i)(2). Thus, under the language of the Bail Reform Act of 1984, a defendant suffers "detention" only when committed [by the district court] to the custody of the Attorney General; a defendant admitted to bail on restrictive conditions, as respondent was, is "released."

515 U.S. at 57 (citations omitted); *see also* 18 U.S.C § 3141(a) ("A

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judicial officer [i.e., federal magistrat e judge or district judge] . . . before whom an arrested person is brought *shall* order that such person be released or detained, pending [further] j udicial proceedings, under this [Act].").

The 1984 Act completely superseded the Bail Reform Act of 1966 and funda - mentally changed the law. "It transforme d preexisting practice in very significant ways, providing among other t hings for the pretrial detention of persons charged with certain serious felo nies on the ground of dangerousness -- a ground theretofore not cognizable." *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990).[FN1] As a technical matter, the 1984 Act ad ded sections 3062 and 3141 -3150 to Title 18 of the U.S. Code, and it repealed then existing sections 3043 and 3141 -3151. The 1984 Act also amended 18 U.S.C . §§ 3041, 3042, 3154, 3156, 3731, 3772, and 4 282; 28 U.S.C. § 636; Fed. R. Crim. P. 5, 15, 40, 46, and 54; a nd Fed. R. App. P. 9.

II. Release or Detention Pending Trial

A. Generally

A person arrested for a federal off ense must be brought "without unnecessary delay before the nearest avai lable federal magistrate judge" for his initial appearance. Fed. R. Crim. P. 5(a), 9(c)(1). At this proceeding, the magistrate judge "shall," among other thi ngs, "detain or conditionally release the defendant as provided by statute or i n these rules." Fed. R. Crim. P. 5(c). Rule 46, captioned "Release from Custody, " provides that "[e]ligibility for release prior to trial shall be in accord ance with 18 U.S.C. § § 3142 and 3144." Fed. R. Crim. P. 46(a). Sect ions 3142 and 3144 are a part of the Bail Reform Act of 1984 (1984 Act).

Under the 1984 Act, the magistrate judge "shall" order that a "person charged with an offense" be

(1) released on personal recogniza nce or upon execution of an unsecured appearance bond, under subsect ion (b) of this section;

(2) released on a condition or com bination of conditions under subsection (c) of this section ;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion unde r subsection (d) of this section; or

(4) detained under subsection (e) of this section.

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18 U.S.C. § 3142(a).

In figuring out which option to pick, the magistrate judge relies -- at least in part -- on the recommendation of the U.S. Pretrial Services Agency. *See* 18 U.S.C. §§ 3152-3154 (establishing Pretrial Services Agency in every judicial district and prescribing duties); E.D. Mich. Local Crim. R. 5.1(b), 10.1(b). This recommendation is the result of a Pretrial Services Officer's (1) interview of the defendant, (2) receipt of information from the government and defense counsel, and (3) independent (though brief and necessarily cursory) investigation of the defendant's residential, familial, and employment situations. The recommendation is usually made in writing (in a report rarely longer than 4 pages with a radioactive orange cover sheet), but it is not uncommon for the recommendation to be made orally in open court because there was insufficient time for the Pretrial Services Officer to prepare a written report. These recommendations typically carry some weight with the magistrate judges, but are not controlling. Remember that the Pretrial Services Officer will usually not know anything about the specifics of the offense or the dangerousness of the defendant unless those facts are made plain in the charging document or you provide this information to the officer. Thus, in any case in which the government is seeking detention or restrictive conditions of release, the AUSA should contact the Pretrial Services Officer early in the process to make sure that she has all of the available information about both the crimes alleged and the defendant's (1) criminal record, (2) history of violence, jumping bail, and drug or alcohol abuse, (3) employment situation and history, (4) assets, (5) domestic situation and recent residential history, and (6) anything else that is relevant.

B. Release on Personal Recognizance or an Unsecured Appearance Bond

"Release on personal recognizance," 18 U.S.C. § 3142(b) (caption), means release on the following conditions: (1) that the defendant promise to appear at all subsequent judicial proceedings[FN2] and (2) that he "not commit a Federal, State, or local crime," *id.*

"Release on . . . [an] unsecured appearance bond," *id.* (caption), means release on the following conditions: (1) that the defendant promise to appear at all subsequent judicial proceedings; (2) that he not commit another crime, *id.*; and (3) that he execute "an unsecured appearance bond in an amount specified by the court," *id.* A bond is a promise, *see* Black's Law Dictionary ___ (Bryan A. Garner ed., 7th ed. 1999), and an unsecured appearance bond is "[a] bond that holds a defendant liable for a breach of the bond's conditions (such as failure to appear in court), but that is not secured

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by a deposit of or lien on property," *id.* at 170. Thus, if ordered released on an unsecured bond, the defendant need not put up any money. His signing an unsecured appearance bond in the amount of, say, $10,000, simply means that he agrees to forfeit $10,000 to the court if he fails to appear for a judicial proceeding.

C. Release on Conditions

1. General ly

If the court believes that release on personal recognizance or an unsecured appearance bond is inadequate to the task, it may order the defendant's release on certain additional conditions. *See* 18 U.S.C. § 3142(c)(1)(B). "Release on conditions," *id.* § 3142(c) (caption), means release on the following conditions: (1) that he promise to appear at all subsequent judicial proceedings; (2) that he not commit another crime; and (3) that he be "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and[/or] the safety of any other person and the community[.]" 18 U.S.C. § 3142(c). Section 3142(c)(1)(B) lists the additional conditions of pretrial release that the court may impose, including a catch-all for "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B)(xiv). Some of the more commonly used conditions require that defendants report as directed to their Pretrial Services Officers, stay within a specific geographical area (e.g., the State of Michigan, metropolitan Detroit (specifying certain counties), surrender their passports, reside in specific houses or apartments, be electronically tethered to their houses ("home detention"), remain in the "custody" of a third party (e.g., uncle Sam, granny), seek or maintain employment, or submit to drug testing and treatment.

With respect to financial conditions of release, the court may decide that an unsecured appearance bond is not enough to "reasonably assure the appearance of the person as required and[/or] the safety of any other person and the community[,]" and that the defendant should also have to make a firmer financial commitment to the court. The COURT may order either one of two additional financial conditions: first, the court may order the defendant to execute a secured appearance bond and put up some property as the security; second, the court may order the defendant to execute a bail bond with a solvent surety.

If the defendant violates any condition of his pretrial release, he could be "subject to a revocation of release, an order of detention, and a prosecution

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for contempt of court." 18 U.S.C. § 3148(a).

2. Release on Secured A ppearance Bond

A secured appearance bond, *see* 18 U.S.C. § 3142(c)(1)(B)(xi), is an unsecured appearance bond that requ ires security in the form of personal or real property that is specified by the court. If the collateral for a secured appearance bond is cash, often referred t o as a "cash bond," the defendant must deposit the "cash" with the clerk's offic e. In this district, "cash" may take the form of "cash, [a] money order, or [a] cashier's check made payable to 'Clerk, United States District Court.'" E .D. Local Crim. R. 46.1(b)(1). A "VISA or MasterCard credit card is [also] accep table for a cash bond." *Id.*

If the collateral for a secured app earance bond is property other than cash, the magistrate judge must obtain th e prior approval of a district judge. *See* E.D. Local Crim. R. 46.1(b)(2) ("Unless approved in writing by a District Judge, property [other than cash] shall not be accepted as collateral for a bond."). A defendant seeking relea se on an appearance bond secured by non - cash property "shall provide the court wi th proof of ownership and the value of the property along with information regar ding existing encumbrances as the judicial office may require." 18 U.S.C. § 3142(c)(1)(B)(xi). This office ordinarily opposes the use of non -cash property to collateralize an appeara nce bond. [FN3]

To prevent property constituting or derived from criminal proceeds from serving as collateral for an appearance b ond, the 1984 Act provides:

> In considering the conditions of re lease described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the p roperty to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not rea sonably assure the appearance of the person as required.

18 U.S.C. § 3142(g). This section codifies the rule of *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966), in which t he Second Circuit held that a district court has the authority to in quire into the source of a large cash bond (a $100,000 cashier's check). The *Nebbia* court noted that "the mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might be ar on the question of the adequacy of the bail . . . ." *Id.* at 304. Of course, cash and non-cash property

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representing or derived from criminal pro ceeds are not likely to assure the appearance of the defendant, who will oft en be all too happy to abandon such property as the cost of doing business.

Thus, if indicated, the AUSA should request the court to examine whether the proposed collateral for an appearance bond is derived from criminal proceeds. Depending on the evidence produced at the hearing, called a "*Nebbia* hearing," the court could refuse to accep t the defendant's proposed collateral or the proposed surety. And whatever the court's decision turns out to be, if the AUSA believes that the collateral is "dir ty," she should consult with the Asset Forfeiture Unit of this office's Civil Di vision to assess the likelihood that the collateral (whether cash or non -cash property) could be subject to crimin al or civil forfeiture under 18 U.S.C. §§ 981, 982 or 21 U.S.C. §§ 853, 881.

3. Release on Bail Bond wit h a Solvent Surety

A "bail bond with solvent sureties, " 18 U.S.C. § 3142(c)(1)(B)(xii), is the other harsher financial alternativ e to an unsecured appearance bond. A bail bond with a solvent surety, also cal led a "surety bond," is basically a three-party agreement involving, naturally, a t hird party, the surety.[FN4] The defendant "execute[s] a bail bond with [a] solvent suret[y]," and the solvent surety "execute[s] an agreement [with the court] to forfeit [to the court] such amount as is reasonably necessary to assu re appearance of the person as required." *Id.*[FN5] Thus, if the court sets a surety bond in the amount of $100,000, and if the defendant thereaf ter fails to appear at a judicial proceeding, the surety must pay the court $100,000.

Most sureties are corporations esta blished to engage in the business of bailing people out. Corporate sureties, like most service providers, charge their customers a fee. Defendants in thi s district may use only those corporate sureties that have been approved by the d istrict court.

For the court to approve of the use of a non-corporate surety, it must be satisfied of the surety's solvency. Rule 46 provides in relevant part:

> *(d) Justification of Sureties.* Every surety, except a corporate surety which is approved as provide d by law, shall justify by affidavit and may be required to describe in the affidavit the property by which the surety proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertaki ngs for bail entered into by the surety and remaining undischarged and all the other liabilities of the surety. No bond shall be approved unless the s urety thereon appears to be qualified.

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Fed. R. Crim. P. 46(d). Similarly, the 1984 Act directs that a surety

> shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

18 U.S.C. § 3142(c)(1)(B)(xii).

In *United States v. Nebbia*, 357 F.2d 303 (2d Cir. 1966), the Second Circuit observed that a district court may reject a surety "'[i]f the court lacks confidence in the surety's purpose or ability to secure the appearance of a bailed defendant.'" *Id.* at 304. Thus, if indicated, the AUSA should request the court to examine whether the defendant's proposed surety is sufficiently reliable and solvent. Depending on the evidence produced at the *Nebbia* hearing, the court could reject the proposed surety.

D. The Defendant's Failure to Appear

If the court releases the defendant pending trial on an unsecured appearance bond, a secured appearance bond, or a surety bond, and the defendant thereafter fails to appear for a judicial proceeding, the government should move for and "the district court *shall* declare a forfeiture of the bail." Fed. R. Crim. P. 46(e)(1); *see also* 18 U.S.C. § 3146(d) ("judicial officer *may* . . . declare any property designated [as bail] to be forfeited to the United States"). To be useful, the declaration of forfeiture must be followed by the entry of a civil judgment in favor of the government. But if the defendant surrenders himself or is arrested and dragged in by his surety[[FN6]] before entry of the judgment, "[t]he court may direct that [the] forfeiture be set aside in whole or in part, upon such conditions as the court may impose." Fed. R. Crim. P. 46(e)(2). If the defendant does not reappear, "the court shall on motion [of the government] enter a judgment of default and execution may issue thereon." Fed. R. Crim. P. 46(e)(3).

A judgment for the government is enforced by the Financial Litigation Unit under the Federal Debt Collection Procedures Act of 1990. *See* 28 U.S.C. § 3201-3206 (relating to government's "postjudgment remedies"). If the defendant reappears "[a]fter entry of such judgment, the court may remit it in whole or in part." Fed. R. Crim. P. 46(e)(4). "When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be

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exonerated by a deposit of cash in the am ount of the bond or by a timely surrender of the defendant into custody." Fed. R. Crim. P. 46(f).

The defendant's failure to appear h as serious nonfinancial consequences as well. Once the defendant is apprehended, he could be made "subject to a revocation of release, an order of detent ion, and a prosecution for contempt of court." 18 U.S.C. § 3148(a). In addition, he could be prosec uted for the separate offense of bondjumping. *See id.* § 3146.

E. Temporary Detention for Revocation of Conditional Release or Deportation

Temporary detention is a limited pe riod of detention -- no more than 10 business days -- that can be ordered only in certain limit ed circumstances. Temporary detention "shall" be ordered if

* the defendant is on release pending trial in another criminal case (state or federal) that involves a felony; on release pending imposition or execution of sentence or pending ap peal in another criminal case; on probation or released on parole in another criminal case, *and*

* "the person may flee or pose a dang er to any other person or the community." 18 U.S.C. §§ 3142(d)(1)(A), (2).

Temporary detention "shall" also be order ed if

* the defendant is neither a U.S. cit izen nor a permanent resident alien (i.e. someone with a "green card"), *and*

* "the person may flee or pose a dang er to any other person or the community." 18 U.S.C. §§ 3142(d)(1)(B), (2).

During the period of temporary detention, the AUSA must

> notify the appropriate court, proba tion or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Serv ice. If the official fails or declines to take such person into custody du ring that period, such person shall be treated in accordance with the othe r provisions of this section, notwithstanding the applicability o f other provisions of law governing release pending trial or deportatio n or exclusion proceedings.

18 U.S.C. § 3142(d). "Such person shall be treated i n accordance with the other provisions of this section" simply means that the magistrate judge must

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order that the defendant be released (wit h or without conditions) or detained pending further judicial proceeding based on the criteria applicable to ordinary defendants.

F. Detention

1. General ly

Although there is a general presump tion in favor of pretrial release, the 1984 Act provides that the magistrate jud ge "shall" order that the defendant be detained pending trial

> [i]f, after a hearing pursuant to t he provisions of [section 3142(f)], the [magistrate judge] finds that no co ndition or combination of conditions will reasonably assure the appearan ce of the person as required and the safety of any other person and the community.

18 U.S.C. § 3142(e). Thus, a defendant may be detain ed because he represents an unacceptable risk of flight *or* an unacceptable danger to specific individuals or to the community at large. The AUSA should make clear to the court which basis for detention th e government is relying on, or that it is relying on both.

2. Risk of Fl ight

The 1984 Act authorizes the court t o order pretrial detention if there is "a serious risk that the [defendant] will flee." 18 U.S.C. § 3142(f)(2)(A). The government must establish risk of fli ght by a preponderance of the evidence. *See, e.g., United States* [redacted] *Mercedes*, ___ F.3d ___, ___ (2d Cir. 2001) ("The government retains the ultima te burden of persuasion by the lesser standard of a preponderance of the eviden ce that the defendant presents a risk of flight."); *United States* [redacted] *Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) (per curiam) ("On a motion for pretrial d etention, the government bears the burden of showing by a preponderance of t he evidence that the defendant poses a flight risk, and by clear and convincing evidence that the defendant poses a danger to the community."); *see also United States* [redacted] *Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) ("Nor has the government distinguished between flight and dangerousness, although as we read se ction 3142(f), the clear and convincing standard applies only to the latter.").

The 1984 Act creates a rebuttable p resumption in favor of detention based on risk of flight

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> if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), or an offense under section 924(c) [using or carrying firearm in relation to crime of violence or drug trafficking crime], 956(a) [conspiracy to kill, kidnap, etc. in a foreign country], or 2332b [terrorism across international boundaries] of title 18 of the United States Code.

18 U.S.C. § 3142(e).

The principal risk-of-flight considerations are whether the defendant (1) has substantial ties to the local community (employment, spouse, children, ownership of business, real estate, or other nonportable assets, etc.); (2) has failed to appear in court in another criminal case; (3) has a genuine incentive to flee (high likelihood of conviction, exposure to long prison term, likelihood of bad collateral consequences in other criminal cases, fear of retribution from victims, etc.), and (4) has a mental disease or defect (too drunk, drug-addled, paranoid, schizoid, etc. to control own behavior). *See* 18 U.S.C. § 3142(g).

3. Dangerousness

The 1984 Act authorizes the court to order pretrial detention on the basis of dangerousness if (1) the defendant is charged with a "crime of violence,"[FN7] a capital offense, or a drug offense carrying a maximum term of imprisonment of 10 years or more, ***and*** (2) "no condition or combination of conditions or [pretrial release] will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. §§ 3142(e), (f). The government must establish the defendant's dangerousness "by clear and convincing evidence." *Id.* § 3142(f); *see also, e.g., United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985) ("Nor has the government distinguished between flight and dangerousness, although as we read section 3142(f), the clear and convincing standard applies only to the latter.").

The 1984 Act also authorizes the court to order pretrial detention in *any* case if there is "a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." 18 U.S.C. § 3142(f)(2)(B).

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The Act creates a rebuttable presum ption in favor of detention based on dangerousness in two situations. The first is when the judicial officer finds that there is probable cause to bel ieve that the person committed

> the charged offense and the charged offense is an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C . 801 et seq.), the Controlled Substances Import and Export Act (2 1 U.S.C. 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), or an offense under section 924(c) [using or carr ying firearm in relation to crime of violence or drug trafficking cri me], 956(a) [conspiracy to kill, kidnap, etc. in a foreign country], or 2332b [terrorism across international boundaries] of title 18 of the United States Code.

18 U.S.C. § 3142(e).

The second situation giving rise t o a rebuttable presumption of dangerousness, also described in Section 3142(e), is

> when it is determined that a person charged with a seriously dangerous offense has in the past been convic ted of committing another serious crime while on pretrial release [i.e., a federal or state "crime of violence," capital offense, or drug offense ca rrying a maximum term of imprisonment of 10 years or more]. Such a histo ry of pre-trial criminality is, absent mitigating information, a rational basis for concluding that a defendant poses a significant threat to commu nity safety and that he cannot be trusted to conform to the requireme nts of the law while on release.

S. Rep. No. 98-225, at 4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3202. *See* 18 U.S.C. § 3142(e). This rebuttable presumption doe s not arise, however, if the period beginning w ith the date of defendant's prior conviction or the date of his release fro m imprisonment for that conviction, whichever is later, and the date of the d etention hearing exceeds five years. *Id.* § 3142(e)(3).

G. The Detention Hearing

Before issuing an order of pretrial detention, the magistrate judge must conduct a detention hearing. *See* 18 U.S.C. §§ 3142(e), (f).

1. Hearing Proc edures

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The 1984 Act requires that the detention hearing be held "immediately upon the person's first appearance before the judicial officer," *id.* § 3142(f), but it also entitles the government to a continuance of the hearing for at least one but no more than three business days, and entitles the defendant to a continuance of at least one but no more than five business days, *id.* § 3142(f)(2). "[F]or good cause," the magistrate judge may grant either party a longer continuance. *Id.* "During [the] continuance, [the defendant] shall be detained . . . ." *Id.*[FN8] However, once the detention hearing begins, the defendant " *may* be detained pending completion of the hearing." *Id.*

In practice, the magistrate judges in our district usually grant continuances to the government only if the AUSA makes a factual proffer establishing a basis for detention authorized by the 1984 Act, and the continuances that are granted are usually for only one or two days. If the government fails to make an adequate proffer, the magistrate judge may well start the detention hearing immediately and release the defendant pending completion of the hearing.

"The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at [a detention] hearing." 18 U.S.C. § 3142(f). Thus, hearsay is admissible. *See also* Fed. R. Evid. 1101(d)(3) (FRE do not apply to "proceedings with respect to release on bail or otherwise").

With respect to due process, the 1984 Act provides:

> At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.

18 U.S.C. § 3142(f).

The government's presentation of evidence typically consists of the testimony of the case agent (who is the government's sole or principal witness), and/or a proffer of evidence made by the AUSA. The evidence will also automatically include the report of the Pretrial Services Officer.

The Jencks Act, now codified at Fed. R. Crim. P. 26.2, applies to detention hearings. *See* Fed. R. Crim. P. 26.2(g)(3), 46(i). This means that each party must disclose to the other party the prior statements of its witnesses, if

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any. Although a witness's prior statemen ts are not *required* to be disclosed until after the witness testifi es on direct examination, *see* Fed. R. Crim. P. 26.2(a), the magistrate judge will likely be irritated if the government fails to disclose witness stat ements before the hearing begins.

2. Criteria for Pretrial Rel ease or Detention

The Act sets forth the criteria by which the court (usually the magistrate judge) must decide the question of pretri al release or detention. Section 3142(g) provides that the court

> shall . . . take into account t he available information concerning --
>
> (1) The nature and circumstances of the o ffense charged, including whether the offense is a crime of [redacted] iolence or involves a narcotic drug;
>
> (2) the weight of the evidence aga inst the person;
>
> (3) the history and characteristic s of the person, including --
>
> (A) the person's character, physical and m ental condition, family ties, employment, financial re sources, length of residence in the community, community ties, pas t conduct, history relating to drug or alcohol abuse, criminal histor y, and record concerning appearance at court proceedings; and
>
> (B) whether, at the time of th e current offense or arrest, the person was on probation, on pa role, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> (4) the nature and seriousness of the danger to any person or the com - munity that would be posed by the person' s release.

18 U.S.C. § 3142(g).

3. Content of Release or Detention Order

If at the conclusion of the hearing the court orders that the defendant be released pending trial, the order "shall . . . include a written statement that sets forth all the conditions to whi ch the release is subject, in a manner

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sufficiently clear and specific to serve as a guide for the person's conduct." 18 U.S.C. § 3142(h)(1).

If, instead, the court orders that the defendant be detained pending trial, the order "shall . . . include written findings of fact and a written statement of the reasons for the detention." *Id.* § 3142(i)(1); *see also* Fed. R. App. P. 9(a)(1) ("The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case.").

4. Reopening the Detention Hearing

A detention

hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

18 U.S.C. § 3142(f). "The judicial officer may at any time amend the order [of release on conditions] to impose additional or different conditions." *Id.* § 3142(c)(3).

H. Review of Release/Detention Order by District Judge, Court of Appeals

Detention hearings in this district are invariably conducted by magistrate judges. See Fed. R. Crim. P. 5(c) (at initial appearance, "magistrate judge . . . shall detain or conditionally release the defendant"); 28 U.S.C. § 636(a)(2) (conferring on magistrate judges "power to . . . issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial"). A magistrate judge's order of pretrial release or detention *must* be reviewed by a district judge if either party moves for such review. *See* 18 U.S.C. §§ 3145(a), (b). If the magistrate judge enters an order of release, "(1) the attorney for the Government may file . . . a motion for revocation of the order or amendment of the conditions of release; and (2) the [defendant] may file . . . a motion for amendment of the conditions of release." 18 U.S.C. § 3145(a). If the magistrate judge enters an order of detention, "the [defendant] may file a motion for revocation or amendment of the order" Id. § 3145(b). A motion filed by the government or the defendant "shall be

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determined promptly." *Id.*

If the AUSA believes that a magistrate judge's order of pretrial release should be reviewed by a district judge, she should contact the court clerk of the appropriate district judge immediately to schedule the review hearing. If the charging instrument is a complaint, the reviewer is the presiding district judge. *See* E.D. Mich. Local Crim. R. 57.2, Local R. 77.2(a). If the charging instrument is an indictment, the reviewer is the district judge to whom the case was assigned, or if that judge is unavailable, the presiding district judge, *see* E.D. Mich. Local R. 77.2(b).

The fact that under the 1984 Act the government has the *right* to have a magistrate judge's order of release reviewed by a district judge, *see* 18 U.S.C. § 3145(a), implies that the magistrate judge's order of release should be stayed pending review of the order by a district judge. In *United States v. Huckabay*, 707 F. Supp. 35 (E.D. Pa. 1989), the magistrate judge ordered pretrial release but detained the defendant pending review by a district judge, explaining that "'an appeal of the magistrate's release order after a motion for detention has been filed at the initial appearance, by statutory implication, authorizes the judicial officer [i.e., the magistrate judge] to stay the release order to allow the court having original jurisdiction [i.e., the district judge] to pass upon the detention issue.'" *Id.* at 36. The district judge agreed, observing that "[r]equiring release pending review by the district court could frustrate the very purpose of review." *Id.* at 37. If the magistrate judge refuses to stay her order of release, the AUSA should request a stay from the district judge.

The AUSA should make sure that the district judge has a copy of the audio tape from the hearing before the magistrate judge, a copy of the magistrate judge's order of release, and a copy of the report of the Pretrial Services Agency. The government's motion for review of the magistrate judge's order "shall be determined promptly" by the district judge. 18 U.S.C. § 3145(a). Some district judges will conduct the hearing on the same day; others will wait for another day or two. The AUSA should order an expedited transcript of the hearing before the magistrate judge (after obtaining the approval of the Criminal Chief). Some judges will not conduct their review until a transcript is available.

The district judge's review of a magistrate judge's decision is *de novo*.[FN9] The district judge, therefore, may rely entirely on the record that was before the magistrate judge, or he may expand the record by conducting a limited or full-blown hearing. The AUSA should be prepared to present live witnesses at such a hearing. At the conclusion of his review, the district judge will enter an order of pretrial detention or release, and he "must state in

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writing, or orally on the record, the reasons for [that] order." Fed. R. App. P. 9(a)(1); *see also* 18 U.S.C. § 3142(i)(1).

If the district judge issues an order of pretrial release, the government may appeal the order to the U.S. Court of Appeals for the Sixth Circuit. *See* 18 U.S.C. § 3145(c); Fed. R. App. P. 9(a). The AUSA should contact her supervisor and the Appellate Chief immediately to discuss this option. A government appeal of an order of release, like its appeal of any other order or judgment of the district court, must be approved by the Appellate Chief, the United States Attorney, and the Solicitor General of the United States. "The appeal should be determined promptly." 18 U.S.C. § 3145(c); *see also* Fed. R. App. P. 9(a)(2).

III. Release or Detention Pending Imposition or Execution of Sentence

Once a defendant has been convicted, the 1984 Act tilts the playing field toward detention. It provides:

> The judicial officer shall order that [a convicted defendant] . . . be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c). If the judicial officer makes such a finding, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c).

18 U.S.C. § 3143(a)(1). In practice, the government, at least in this district, often permits a convicted defendant to remain free pending the imposition of sentence or the execution of sentence following its imposition.[FN10] This generally occurs in cases where a defendant on pretrial release pleads guilty, or where a defendant on pretrial release is convicted at trial and the AUSA is not really concerned about the risk of flight or danger to others posed by the defendant. Of course, the AUSA should insist that the court comply with Section 3143(a) when circumstances indicate that detention pending sentencing or service of sentence would be prudent.

If a defendant is convicted of a specified serious offense, the presumption of detention is even stronger. The specified offenses are "crime[s] of violence," capital offenses, and drug offenses carrying a maximum term of imprisonment of 10 years or more. 18 U.S.C. § 3143(a)(2). Such a defendant "shall"

> be detained unless --

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(A)(i) the judicial officer finds ther e is a substantial likelihood that a motion for acquit tal or new trial will be granted; or

(ii) an attorney for the Gove rnment has recommended that no sentence of imprisonment be imposed on the person; and

(B) the judicial officer finds by clear and convincing evidence that the person is not likely to flee o r pose a danger to any other person or the community.

18 U.S.C. § 3143(a)(2).

IV. Release or Detention Pending Appeal

The 1984 Act sets forth a presumpti on of detention when a defendant who has been sentenced to a term of imprisonment files an appeal. *See* 18 U.S.C. § 3143(b). Ordinarily, the presumption is rebuttable, and the burden is on the defendant to establish by clear and c onvincing evidence that he should be released pending appeal. *See id.* § 3143(b)(1) (defendant must show that he is not likely to flee or pose a d anger to any other person or the community, and that the appeal will likel y result in the reversal of his conviction or the vacation of his prison term). If, however, the defendant has been convicted of and sentenced for a "c rime of violence," a capital offense, or a drug offense carrying a maximum term of imprisonment of 10 years or more, the presumption of detention is irrebutta ble. *See id.* § 3143(b)(2).

[redacted]. Release or Detention of Arrestees Oth er than Ordinary Defendants

A. Probationers and Supervised Releasees

A defendant arrested for a violatio n of probation or supervised release "may be released pursuant to Rule 46(c) p ending the revocation hearing." Fed. R. Crim. P. 32.1(a)(1). Rule 46(c) says that release or detention "shall be in accordance with 18 U.S.C. § 3143." Fed. R. Crim. P. 46(c). Section 3143(a) governs the release or detention of convi cted defendants awaiting the imposition or execution of sentence. *See supra* pp. 17-18.

B. Material Witnesses

A provision of the 1984 Act deals w ith material witnesses, *see* 18

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U.S.C. § 3144, who are individuals whose presence at trial "may become impracticable to secure . . . by subpoena ." Many material witnesses are aliens whose whereabouts at the time of trial wi ll be a foreign country or unknown. Basically, a material witness may be arre sted on a material witness complaint and warrant issued by the court, and then det ained until his testimony can be secured by deposition. *See id.* ; Fed. R. Crim. P. 15(a); *see also, e.g., Torres-Ruiz* [redacted] *. United States District Court* , 120 F.3d 933, 934 - 36 (9th Cir. 1997) (per curiam).

C. Aliens

Aliens may be subject to "temporary detention" for up to 10 days to allow for the notification of INS and the defen dant's transfer to INS for administrative deportation proceedings. *See* 18 U.S.C. §§ 3142(d)(1)(B), (2); *supra* p. 9.

VI. Additional Resources

* *Annual Review of Criminal Procedure (Part II: Preliminary Proceedings (Bail)* , Georgetown Law Journal.

* 27 Moore's Federal Practice ch . 646 (3d ed., looseleaf service updated annually).

* 3A Charles Alan Wright, Federa l Practice and Procedure §§ 761-778 (2d ed. Supp. 2001).

* David Marshall Nissman, Proving Federal Crimes ch. 17 (2001).

* 3 Wayne R. LaFave et al., Crim inal Procedure ch. 12 (2d ed. 1999).

FN 1. Still, under the 1966 Act district cour ts effectively ordered pretrial detention based on dangerousness by order ing pretrial release with bail set in an amount clearly beyond the defendant 's means (e.g., $ 500,000), a practice specifically prohibited by the 1 984 Act. *See* 18 U.S.C. § 3142(c)(2) ("The judicial officer may not impose a financial condition that results in the pretrial de tention of the person.").

FN 2. "*personal recognizance.* The release of a defendant in a criminal case in which the court takes th e defendant's word that he or she will appear for a scheduled matter or whe n told to appear." Black's Law

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Dictionary 1278 (Bryan A. Garner ed., 7th ed. 1999). "*release on recognizance*. The pretrial release of an arrested per son who promises, usu. in writing but without supplying a s urety or posting bond, to appear for trial at a later date. -- Also termed *release on own recognizance*." *Id.* at 1292.

FN 3. If real property is offered as collater al, the AUSA must be satisfied based on a review of deeds, mortgages, li ens, and appraisals that the owner (whether the defendant or someone else) h as sufficient equity in the property to back the amount of the bond. The office's Asset Forfeiture Unit can assist the AUSA in making this inquir y. The AUSA should also thoroughly examine or cross-examine anyone with an ownership interest in the property about several matters, including her will ingness to lose her interest in the property if the defendant fails to appear ; her knowledge of the defendant's criminal activity; her involvement with t he defendant in criminal activity, if any, and her own criminal record and a ctivity, if any; and her knowledge of the existence of assets owned by the d efendant from which she might expect repayment in the event of forfeitu re of collateral. Such questioning may lead to surprising and helpful inform ation, especially when defense counsel fails to thoroughly prepare the w itness.

In the rare case where the real pro perty in question is sufficiently valuable and "clean" to serve as collater al, the AUSA should simply agree with defense counsel to jointly seek the appro val of the presiding district judge if the charges are contained in a complaint, or the approval of the district judge to whom the case was assigned if the char ges are contained in an indictment.

FN 4. "surety (shuur[-þ]-tee). 1. A person who is primarily liab le for the payment of another's debt or the performa nce of another's obligation. . . ." Black's Law Dictionary 1278 (Bryan A. Gar ner ed., 7th ed. 1999). A surety can be an individual or a corporation. I n this context, a surety is often referred to as a "bail bondsman," and the formal legal term is "bailer." *See id.* at 136. Another term used is "bail bond ing agency." *See* E.D. Local Crim. R. 46.1(b)(3) ("Court p ersonnel shall not recommend specific bail bonding agencies. ").

FN 5. "*bail bond*. A bond given to a court by a criminal d efendant's surety, guaranteeing that the defendant w ill duly appear in court in the future; a bond given to obtain a prisoner 's release and to secure the prisoner's appearance to answer legal pro cess. * The effect of the release on bail bond is to transfer custody of th e prisoner from the officers of the law to the custody of the surety on the b ail bond, whose undertaking is to redeliver the defendant to legal custody at the time and place appointed in the bond."

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Black's Law Dictionary 169 (Bryan A. Garner ed., 7th ed. 1999).

FN 6. The 1984 Act empowers sureties to arrest a fugitive defendant. *See* 18 U.S.C. § 3149 ("A person charged with an offense, who is released upon the execution of an appearance bond with a surety, may be arrested by the surety, and if so arrested, shall be delivered promptly to a United States marshal and brought before a judicial officer.").

FN 7. "Crime of violence" is defined at 18 U.S.C. § 3156(a)(4). The circuits are split as to whether the crime of being a felon in possession of a firearm, *id.* § 922(g)(1), is a "crime of violence" under the 1984 Act. *Compare United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000) (FIP "crime of violence") *with United States v. Lane*, 252 F.3d 905 (7th Cir. 2001) (FIP not "crime of violence"), and *United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999) (same). The Sixth Circuit has not yet addressed the issue in a published opinion.

FN 8. This brief detention is often referred to as "temporary detention," which is a term of art in the 1984 Act, *see* 18 U.S.C. § 3142(d) (caption), that actually refers to an entirely different kind of detention. *See id.* (providing for detention of up to 10 days of either a defendant who is on release in connection with another criminal case or a defendant who is an alien, and who "may flee or pose a danger to any other person or the community").

FN 9. Although "[t]he Sixth Circuit has not addressed this question," *United States v. Yamini*, 91 F. Supp. 2d 1125, 1127 (S.D. Ohio 2000), the great weight of authority holds that the district judge's standard of review of a magistrate judge's order of pretrial release or detention is de novo.. *See United States v. Leon*, 766 F.2d 77, 80 (2d Cir. 1985); *United States v. Delker*, 757 F.2d 1390, 1394 (3d Cir.1985); *United States v. Clark*, 865 F.2d 1433, 1436 (4th Cir.1989); *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985); *United States v. Maull*, 773 F.2d 1479, 1481-82 (8th Cir. 1985) (en banc); *United States v. Hurtado*, 779 F.2d 1467, 1481 (11th Cir.1985). In *Yamini*, a Sixth Circuit district judge canvassed the case law and concluded:

> The district court . . . should not defer to the magistrate judge's ultimate conclusion, even if "the whole process [in the district court] . . . does not] start from scratch, as if the proceedings before the magistrate had never occurred." Rather, "[t]he point is that the district court is to make its own 'de novo' determination of facts, whether

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different from or an adoption of th e findings of the magistrate." Thus, while the district courts are not r equired to engage in a plenary procedure pursuant to § 3145(b), the circuit courts that have addressed the standard of review ag ree that some independent review is required.

91 F. Supp. 2d at 1128 (citations omitted , brackets in original).

FN 10. The imposition of sentence occurs at th e sentencing hearing. The execution of sentence, by contrast, "comm ences on the date the defendant is received in custody awaiting transportati on to, or arrives voluntarily to commence service of sentence at, the offi cial detention [read penal or correctional] facility at which the sente nce is to be served." 18 U.S.C. § 3585(a).

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Chapter 17
Bail and Detention

17.01 General provisions
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17.01 General provisions

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required . . ." U.S. CONST. AMEND. VIII. The United States Supreme Court has interpreted this amendment to prohibit the imposition of excessive bail without creating a right to bail in criminal cases. *See United States v. Salerno*, 481 U.S. 739, 754-55 (1987)("Eighth Amendment does not grant absolute right to bail"). The subject of bail and detention also implicates the Fourteenth Amendment's Due Process Clause, and requires that laws imposing pretrial detention "serve a compelling governmental interest", *Salerno*, 481 U.S. at 752, and "the Due Process Clause of the Fifth Amendment".

The principal source of this chapter is the Criminal Resource Manual of the United States Attorney's Manual § 26.

17.02 Bail Reform Act

In federal criminal proceedings, release and detention determinations are governed by the Bail Reform Act of 1984. 18 U.S.C. §§ 3141-3156 (1990). These sections contain specific guidelines that "judicial officers" must follow in considering whether a defendant should be detained or released pending federal criminal proceedings.

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Title 18, United States Code, Section 3141(a) gives "judicial officers" authority to make determinations regarding bail in all stages of a criminal case, up to and including the trial stage. The term "judicial officers" is defined in Title 18, United States Code, Section 3156, along with other terms relevant to the matter of bail in criminal cases. Once a defendant has been convicted of the federal charges, Title 18, United States Code, Section 3141(b) vests authority with district judges and the appellate courts to make bail determinations pending the imposition or execution of sentence, or pending appeal of the same.

Title 18, United States Code, Sections 3152 through 3154 pertain to the administration and the supervision authority of pretrial services officers in the federal criminal system. Section 3154 specifically empowers pretrial services officers with the authority to collect information from defendants and other sources relative to the matter of bail. Pretrial services officers are authorized to make recommendations as to whether a defendant should be detained or released, including specific recommendations regarding conditions of release. 18 U.S.C. § 3154(1). Pretrial services officers are also authorized to establish facilities for and conduct the supervision of defendants released under the provisions of Section 3142.

17.03 Categories

Title 18, United States Code, Section 3142 defines the categories of "release and detention" a defendant may be subject to and contains the rules under which the court and parties must proceed relating to bail matters. In that regard, Section 3142(a) states "that upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall make a determination regarding bail status of the defendant, and shall enter an order designating a defendant's custodial status" under one of four categories:

(1) released on personal recognizance or upon execution of an unsecured appearance bond (following the provisions of Section 3142(b));

(2) released on a condition or combination of conditions as defined by Section 3142(c);

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under Section 3142(d); or

(4) detained pursuant to the provisions of Section 3142(e).

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17.04 Personal recognizance

Title 18, United States Code, Section 3142(b) requires a judicial officer to order the pretrial release of a defendant on "personal recognizance" or upon the defendant's execution of an "unsecured appearance bond" in an amount specified by the court. A Section 3142(b) release order must be conditioned on a defendant's agreement to "not commit a Federal, State, or local crime during the period of release." If, however, the judicial officer determines that the release of a defendant on "personal recognizance" or "unsecured appearance bond" would not "reasonably assure" the defendant's appearance at court proceedings, or will "endanger the safety of any other person or the community", then there is no obligation to order release. 18 U.S.C. §§ 3142(b) and 3142(c). In this event, the judicial officer must follow the provisions of Title 18, United States Code, Section 3142(c).

17.05 Conditional release

Once a judicial officer has made the determination that a defendant does not qualify for release under Section 3142(b), then the judicial officer must follow Section 3142(c). When structuring the release of a defendant under Section 3142(c), the judicial officer must order that the defendant "not commit a Federal, State, or Local crime during the period of release. 18 U.S.C. § 3142(c)(1)(A). In addition, the judicial officer must impose the least restrictive condition or combination of conditions necessary to "reasonably assure" the defendant's appearance as required and to "reasonably assure" the safety of any person and the community". 18 U.S.C. § 3142(c)(1)(B). An illustrative list of conditions is set forth in § 3142(c)(1)(B)(i)-(xiv) which gives the judicial officer authority to impose conditions not specifically enumerated so long as the same serve the purposes set out in § 3142(c)(1)(B). It is important to note that "Section 3142 speaks only of conditions that will "reasonably" assure appearance, not guarantee it". *United States* [redacted] *Xulum*, 84 F.3d 441, 443 (D.C. Cir. 1996)(per curiam). A judicial officer is not permitted to impose any financial conditions of release which result in the pretrial detention of a defendant. 18 U.S.C. § 3142(c)(2). The conditions of release imposed on a defendant under a Section 3142(c) order may be amended at any time to impose additional or different conditions of release. 18 U.S.C. § 3142(c)(3).

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17.06 Eligibility for release - factors

When making a determination regarding the eligibility of a defendant for pretrial release (whether personal recognizance , unsecured appearance bond, or release on conditions), the judicial officer must consider the factors listed in Section 3142(g), including:

(1) the nature and circumstances of the offense (in particular whether it is an offense which is violent or nonviolent in nature, or involves narcotics);

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person --

(A) character -- including physical and mental condition), family ties, employment, financial resources, length of time in the community, community ties, past conduct history relating to drug or alcohol abuse, criminal history, record of court appearances; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or to the community that would be posed by the person's release.

18 U.S.C. § 3142(g)

In addition to considering evidence of the factors set forth above, the court may upon its own motion, or upon the motion of the government attorney, conduct an inquiry into the source of any property to be designated for potential forfeiture or offered as collateral to secure any bond. 18 U.S.C. § 3142(g)(4). If the court determines that any such collateral or property, because of its source, will not reasonably assure the appearance of the defendant as required, the designation or use of the collateral or property as security for a bond shall be refused. 18 U.S.C. § 3142(g)(4).

17.07 Temporary detention orders

Title 18, United States Code, Section 3142(d) requires a judicial officer to enter an order of temporary detention in cases where a factual determination is made that:

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(1) the defendant:

(A) is, and was at the time the offense was committed, on

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; OR

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(2); and

(2) the defendant may flee or pose a danger to any other person or the community.

18 U.S.C. § 3142(d)

The formula for calculating the 10 day temporary detention period is set forth in Section 3142(d). At the time the 10 day order is entered, the judicial officer must direct the attorney for the government to notify the appropriate "authorities" of the defendant's status. In the event that the "notified authority" declines to take the defendant into custody, then the judicial officer must make an independent determination regarding bail under the provisions of Sections 3142(b), 3142(c), and 3142(e)(if the government moves for detention).

17.08 Detention

The Bail Reform Act requires the pretrial detention of a defendant only if a judicial officer determines that no conditions or combination of conditions exist which will "reasonably assure the appearance of the person", *United States* [redacted] *Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996)(per curiam), and "the safety of any other person and the community." *United States* [redacted] *Rodriguez*, 897 F. Supp. 1461, 1463 (S.D. Fla. 1995); 18 U.S.C. § 3142(c).

Cases Which Qualify For Detention Hearings: Section 3142(f) defines specific situations under which a judicial officer may hold a detention hearing. Those situations are as follows:

(1) Upon the motion of the government attorney, in a case that involves: (a) a crime of violence; (b) an offense with a maximum sentence of life imprisonment or death; (c)

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an offense for which the maximum term of imprisonment is 10 or more years as prescribed by the Controlled Substances Act; or (d) any felony if the person has been convicted of two or more offenses described in paragraphs (a) through (c) or comparable state offenses.

(2) Upon the motion of the government attorney or on the court's own motion, in a case that involves: (a) a serious risk of flight; or (b) a serious risk that the defendant will obstruct justice or threaten a witness.

18 U.S.C. § 3142(f)

Section 3142(f) "does not authorize a detention hearing in the absence of one of the six situations set forth above." *United States* [redacted] *Butler*, 165 F.R.D. 68, 71 (N.D. Ohio 1996). Thus, the government may not request a detention hearing only on the allegations of danger to the community or another person. The "government is required to demonstrate that there are grounds for a hearing under the specific provisions of either 3142(f)(1) or (f)(2)." *Butler*, 165 F.R.D. at 71. "When there exists one or more grounds for holding a hearing under those provisions, the government may proceed on the theory of risk of flight and/or danger to the community or any other person." *Id.* Section 3142(f) may fairly be interpreted as authorizing pretrial detention "only upon proof of a likelihood of flight, a threatened obstruction of justice or a danger of recidivism in one or more of the crimes actually specified by the bail statute." *Butler*, 165 F.R.D. at 71 (*quoting United States* [redacted] *Himler*, 797 F.2d 156, 160 (3d Cir. 1986) *and citing United States* [redacted] *Byrd*, 969 F.2d 106 (5th Cir. 1992); *United States* [redacted] *Ploof*, 851 F.2d 7 (1st Cir. 1988)).

When the court has detemined that a detention hearing is warranted, it may consider evidence relating to a defendant's danger to the community. Detention considerations are then guided by the factors set forth in 18 U.S.C. § 3142(g), and the specific consideration of "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." *Butler*, 165 F.R.D. at 71; 18 U.S.C. § 3142(g)(4). Accordingly, the government must first prove one or more of the grounds listed in 3142(f)(1) or (2) as a prerequisite to the court considering the factor of danger to the community whether there exist appropriate conditions of release in the case. In the *Butler* decision, the court evaluated the government's motion to detain a defendant charged with firearms offenses. In reaching a decision in favor of pretrial detention, the *Butler* court stated:

> there is danger inherent to the community in the unlawful possession of firearms, both a rifle and a pipe bomb. This is particularly true where the possessor has a lengthy criminal

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history, has not been deterred from the commission of crime by prior convictions and appears to be involved in ongoing drug offenses.

165 F.R.D. at 72.

Timing Of Detention Hearing: Title 18, United States Code, Section 3142(f)(2) contains specific guidelines regarding the timing of detention hearings. Ideally, the hearing is supposed to take place immediately upon the defendant's first appearance before the judicial officer. However, given the fact that a defendant may lack representation at this initial appearance, the detention hearing is not likely to go forward unless the court has made other arrangements for the defendant to be represented by counsel. Section 3142(f)(2) also permits a 3 day delay of the detention hearing upon the motion of the government attorney. A defendant may request a continuance of up to 5 days under this section, for good cause shown. Between the time the detention motion is filed and the actual detention hearing (up through the court's ruling on the motion for detention), the defendant will remain in the custody of the United States Marshal's Office. 18 U.S.C. § 3142(f)(2). A hearing may be reopened before or after the court's ruling on a detention motion, at any time before trial if the judicial officer makes a factual finding that information exists that was not previously known at the time of the hearing and that the information is material on the issue of whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of any other person and the community.

Detention Hearings May Proceed By Way of Proffer; Rules of Evidence Do Not Apply: "Detention hearings are an informal proceeding, and the evidence presented is not governed by the Federal Rules of Evidence." *United States* [redacted] *Duncan*, 897 F. Supp. 688, 690 (N.D.N.Y. 1988); 18 U.S.C. § 3142(f)(2). The government may proceed in a detention hearing by way of proffer. *United States* [redacted] [redacted], 39 Fed. Appx. 278, 278-78 (6th Cir. 2002); *United States* [redacted] *Smith*, 79 F.3d 1208, 1209-10 (DC Cir. 1996); *United States* [redacted] *Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987); *United States* [redacted] *Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986); *United States* [redacted] *Winsor*, 785 F.2d 755, 756 (9th Cir. 1986); *United States* [redacted] *Acevedo-Ramos*, 755 F.2d 203, 206-07 (1st Cir. 1985). The rationale for permitting detention hearings to proceed by way of proffer is that such hearings are "neither a discovery device for the defense nor a trial on the merits." *Smith*, 79 F.3d at 1210. "The process that is due is only that which is required by and proportionate to the purpose of the proceeding." *Id.* "That purpose includes neither a reprise of all the evidence presented before the grand jury, *United States* [redacted] *Suppa*, 799 F.2d 115, 119 (3d Cir. 1986), nor the right to confront non-testifying government witnesses, *United States* [redacted] *Accatturo*, 783 F.2d 382, 388-89

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(3d Cir. 1986)." *Smith*, 79 F.3d at 1210 also citing *United States* [redacted] *Hurtado*, 779 F.2d 1467, 1479 (11th Cir. 1985)(purpose of pretrial detention hearing is not to "rehash . . . probable cause" but to provide opportunity for detainee to show no risk of flight or danger to community); *United States* [redacted] *Williams*, 798 F. Supp. 34, 36 (D.D.C. 1992). "A right to require the government to produce its witnesses against [a defendant] would complicate the hearing to a degree out of proportion to the liberty interest at stake - viz. the interest in remaining free until trial, for what is by statute a period of limited duration." *Smith*, 79 F.3d at 1210; *see also* Speedy Trial Act, 18 U.S.C. § 3161, *et seq*.

Application of the Rebuttable Presumption: Title 18, United States Code, Section 3142(e) contains three categories of criminal offenses that give rise to a rebuttable presumption that "no condition or combination of conditions" will (1) "reasonably assure" the safety of any other person and the community if the defendant is released; or (2) "reasonably assure" the appearance of the defendant as required *and* "reasonably assure" the safety of any other person and the community if the defendant is released. These three categories are:

(e) ... a judicial officer finds that:

(1) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(2) the offense described in paragraph one of this subsection was committed while the person was on release pending trial for a Federal, State, or local offense; *and*

(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1) of this subsection, whichever is later.

18 U.S.C. § 3142(e)(1)-(3).

Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), an offense under section 924(c), 956(a), or 2332b of this title, or an offense involving a minor victim under section

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1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.
18 U.S.C. § 3142(e).

The rebuttable presumption relating only to the safety of any other person and the community pertains to those cases meeting the criteria of Section 3142(e)(1)-(3). It is important to note, that all 3 of these conditions must be met for the proper application of the rebuttable presumption of "danger to the community."

The rebuttable presumption relating to both "risk of flight" and "danger to the community" pertains to those cases where the judicial officer finds there is probable cause to believe that the defendant committed: (1) a drug offense (as defined under Title 21) when the maximum term of imprisonment is 10 years or more; or (2) an offense under Title 18, United States Code, Section 924(c). 18 U.S.C. § 3142(e).

The indictment alone is sufficient to raise the rebuttable presumption that no condition (or combination of conditions) will ensure the defendant's reappearance for trial and that no conditions of release will ensure the safety of the community. *See, e.g., Smith*, 79 F.3d at 1210-1211 *citing United States v. Dillon*, 938 F.2d 1412 (1st Cir. 1991); *Suppa*, 799 F.2d at 119; *United States v. Dominguez*, 783 F.2d 702, 706 n.7 (7th Cir. 1986); *Hurtado*, 779 F.2d at 1477-79; *United States v. Contreras*, 776 F.2d 51 (2d Cir. 1985); *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985); *United States v. Mosuro*, 648 F. Supp. 316, 318 (D.D.C. 1986); *see also United States v. Tedder*, 903 F. Supp. 344, 345 (N.D.N.Y. 1995).

Burden of Proof At Detention Hearing: In a pretrial detention hearing, the government's burden is to establish by clear and convincing evidence that no conditions of release will reasonably assure the safety of the community. *Rodriguez*, 897 F. Supp. at 1463 *citing United States v. Orta*, 760 F.2d 887 (8th Cir. 1985); *see also United States* [redacted] 894 F. Supp. 580, 585-86 (N.D.N.Y. 1995) *citing United States v. Chimurenga*, 760 F.2d 400, 405 (2d Cir. 1985). "The issue in such a hearing is whether releasing a defendant would pose a danger to the community that would not exist were [the defendant] detained." *Rodriguez*, 897 F. Supp. at 1463 *citing United States v. Phillips*, 732 F. Supp. 255, 267 (D. Mass. 1990), *reh'g denied*, 952 F.2d 591 (1st Cir. 1992); *see also United States v. Smith*, 79 F.3d 1208, 1209 (D.C.Cir.1996) (per curiam); *United States v. Portes*, 786 F.2d 758 (7th Cir. 1985); *United States v. Orta*, 760 F.2d 887 (8th Cir. 1985). The standard is different when the issue is whether any conditions of release will reasonably assure the defendant's attendance at trial (risk of flight); the government need only prove that

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there are no such conditions by a "preponderance of the evidence." *See United States v. Tedder*, 903 F. Supp. 344, 345 (N.D.N.Y. 1995)*citing United States v. Martir*, 782 F.2d 1141, 1146 (2d Cir. 1986); 18 U.S.C. § 3142(c). It is not necessary that the government prove both flight risk and danger to the community to warrant detention. *See United States v. Flores*, 856 F. Supp. 1400, 1401 (E.D. Cal. 1994).

Requirements For The Contents Of Release and Detention Orders: Title 18, United States Code, Section 3142(h) lists the requirements for the contents of a "release order." Title 18, United States Code, Section 3142(g) lists the requirements for the contents of a "detention order," including the requirement of "written findings of fact and a written statement of the reasons for detention."

17.09 Bail application following detention

When a defendant moves for release on bail following pretrial detention, the court must consider three factors: "(1) the length of the pretrial detention; (2) the extent to which the prosecution is responsible for the delay of the trial; and (3) the strength of the evidence upon which the pretrial detention was based." *United States v. Millan*, 4 F.3d 1038, 1043 (2d Cir. 1993); *United States v. O'Neill*, 52 F. Supp. 2d 954, 960 (E.D. Wis. 1999)(to get to first base on this issue, the defendant must show that either the prosecution or the court has unnecessarily delayed in bringing the case to trial–maybe the prosecutor is stalling because he realizes his case is so weak that pretrial detention is the only punishment in fact he can impose on the defendant).

Regarding the length of pretrial detention, there is no doubt that the longer the pretrial detention the more likely the denial of due process. Typically, this factor weighs in favor of the moving defendant. *See, e.g., United States v. Gonzales-Claudio*, 806 F.2d 334, 341 (2d Cir. 1986)("detention that has lasted for fourteen months and, without speculation, is scheduled to last considerably longer, points strongly to a denial of due process"). This factor by itself, however, is not determinative of a defendant's bail application. *See Millan*, 4 F.3d at 1044 (pretrial detention period of 30-31 months a factor in defendant's favor but not dispositive); *see also United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987)(pretrial detention period of 19 months did not violate defendant's due process rights).

Regarding the reason or "responsibility" for delay factor, the court will consider information relating to pretrial events such as motions for

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continuance, discovery disputes, complexity of the case, plea discussions, and other matters relating to the progress (or lack thereof) of the case.

Regarding the reasons for the pretrial detention, the court will examine the findings from the detention hearing.

17.10 Breach of condition of bond

Title 18, United States Code, Sections 3146 through 3148 describe the penalties a defendant may be subject to for: (1) failure to appear at any proceeding as required (Section 3146); (2) committing an offense while on pretrial release (Section 3147); and (3) violating any condition of pretrial release (which includes the sanction of bond revocation)(Section 3148). In addition, Title 18, United States Code, Section 3149 empowers a surety with arrest authority over offenders, and requires that the surety promptly deliver the offender to the custody of the United States Marshal for proceedings under Section 3148. In this instance, judicial officers are also bound by Federal Rule of Criminal Procedure 46.

Federal Rule of Criminal Procedure 46(e) provides that "[t]he court must declare the bail forfeited if a condition of the bond is breached." FED. R. CRIM. P. 46(f)(1). This language is broad, and reaches any condition of release. *See United States v. Gigante*, 166 F.R.D. 3, 4 (E.D.N.Y. 1996). The Bail Reform Act of 1984 *does not* supersede Rule 46(f). *Gigante*, 166 F.R.D. at 4 (*citing United States v. Vaccaro*, 51 F.3d 189 (9th Cir. 1995); *United States v. Dunn*, 781 F.2d 447 (5th Cir. 1986); *and by way of implication United States v. Dudley*, 62 F.3d 1275, 1278 (10th Cir. 1995); *United States v. Patriarca*, 948 F.2d 789, 793 (1st Cir. 1991); *United States v. Santiago*, 826 F.2d 499 (7th Cir. 1987). "'[T]here is no conflict between Rule 46(f) and the Bail Reform Act; the Rule and the Act are complementary and form a unified system dealing with pretrial release.'" *Gigante*, 166 F.R.D. at 6 quoting *Vaccaro*, 51 F.3d at 192.

17.11 Defendant's appeal of detention order

When a defendant seeks review of a magistrate judge's order of detention, the district court is bound to review the matter de novo, and undertake a complete review of the matter for the purpose of arriving at its own "independent conclusion." *See United States v. Duncan*, 897 F. Supp. 688, 689-90 (N.D.N.Y. 1995) citing *United States v. Leon*, 766 F.2d

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77, 80 (2d Cir. 1985); *see also United States* [redacted] *King*, 849 F.2d 485, 489-91 (11th Cir. 1988); *United States* [redacted] *Williams*, 753 F.2d 329, 331 (4th Cir. 1985). 18 U.S.C. § 3145(a)-(c).

17.12 Miscellaneous sections

Other provisions of Title 18 are relevant to matters concerning release and detention in criminal cases. For example, Section 3143 contains the framework for release or detention of a defendant pending sentence or appeal. Likewise, Section 3144 pertains to the release or detention of a material witness. Finally, Sections 3150 and 3151 discuss the applicability of the Bail Reform Act to those State cases which are removed to Federal Court, and the issue of forfeited bail.

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Chapter 26
Bail and Detention

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26.1 Introduction
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26.1 Introduction

Whether a defendant is detained without bail pending trial often profoundly affects the course of a drug prosecution. For example, pretrial detention or release influences whether a defendant decides to co-operate with the government, as well as the calculation of whether to plead guilty or go to trial. Moreover, Congress has paid special attention to serious drug offenders in the law of pretrial detention, placing much stricter limitations on

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their right to bail, and presuming that most should be detained pending trial.

Federal law of pretrial detention, release, and bail is set forth in the Bail Reform Act of 1984, as amended, 18 U.S.C. §§ 3141-3156. The most important provisions, which govern when a defendant may be held without bail pending trial, are set forth in § 3142(e) (detention), § 3142(f) (detention hearing), and § 3142(g) (factors to be considered in determining whether there are conditions of release that will reasonably assure the appearance of the defendant and the safety of the community).

26.2 Detention for serious drug crimes

westlaw query 18 +S 3142(F)(1)(C)

Nearly all defendants charged with serious drug crimes may be detained pending trial under 18 U.S.C. § 3142(f)(1)(C), which permits the government to move for the pretrial detention of any defendant charged with a federal drug crime for which the *maximum* penalty is more than ten years in prison. In practice, this means that any defendant is subject to pretrial detention if charged with the manufacture, distribution, or possession with intent to distribute of heroin, cocaine powder, crack cocaine base, methamphetamine, phencyclidine, or any other drug classified as a Schedule I or Schedule II controlled substance, as these crimes all have maximum penalties of 20 years in prison under 21 U.S.C. § 841(b)(1)(C) and § 960(b)(3). Defendants conspiring or attempting to commit these offenses are punishable to the same extent under 21 U.S.C. § 846 and § 963, and similarly may be held without bail pending trial under § 3142(f).

- Maximum penalty. Section 3142(f)(1)(C) specifically refers to violations of "the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. § 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 et seq.)." Under this section, it is the maximum penalty that must be ten years or more, not whether the charged offense has a mandatory-minimum penalty of ten years or more.

- Marijuana. Defendants charged with distribution or possession with intent to

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distribute marijuana are not subject to pretrial detention unless the amount involved is *greater* than 50 kilograms, *see* 21 U.S.C. § 841(b)(1)(D) (less than 50 kilograms of marijuana subject to sentence of not more than five years), or the defendant is charged with a "schoolhouse," "playground," or "public housing" offense, in violation of 21 U.S.C. § 860, under which such violations are subject to twice the maximum punishment authorized under § 841(b).

- PCP. Most statute books list phencyclidine (PCP) under Schedule III of the Controlled Substances Act, where it originally was classified. However, PCP has been reclassified as a Schedule II drug, subject to maximum penalties of 20 years in prison under 21 U.S.C. § 841(b)(1)(C) and § 960(b)(3), so that almost any felony federal offense involving PCP would be a "detainable" crime. *See* 43 Fed. Reg. 3359-60 (January 23, 1978) (Final rule transferring phencyclidine to Schedule II from Schedule III, effective February 24, 1978).

26.3 First appearance

A motion for pretrial detention is to be made at a defendant's first appearance, which normally is presentment on a complaint in a case founded upon an arrest on probable cause, or an arraignment on a grand jury original indictment. Although the statute contemplates an immediate hearing on the detention motion, *see* 18 U.S.C. § 3142(f), in common practice, the government is accorded up to three working days after the first appearance for the hearing to be held under the continuance provision of § 3142(f). During this period, the defendant must be held without bond. The "shall" language of the § 3142(f) indicates that the court must grant a motion for a hearing on the motion for pretrial detention, and lacks discretion to deny it outright.

Normally, when a defendant is arrested in a district other than where the prosecution will occur, the first appearance is deemed to take place when the defendant first appears in the prosecuting district. However, this question is not free from doubt. *See United States* [redacted] *Melendez-Carrion*, 790 F.2d 984, 990 (2d Cir. 1986) (detention hearing may be held in first appearance in charging district where defendant is arrested in another district); *United States* [redacted] *Dominguez*, 783 F.2d 702, 704 (7th Cir. 1986) (government was

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not required to request detention in district where defendants were arrested and initially appeared, but could do so when defendants first appeared in charging district; "first appearance" for purposes of § 3142(f) is not necessarily the same as "initial appearance"). *Cf. United States* v. *Evans*, 62 F.3d 1233, 1235-38 (9th Cir. 1995) (while defendant was entitled to detention hearing before magistrate in arresting district, only district court in charging district had authority to review the order).

> **Practice note.** At "removal" proceedings, pursuant to Fed. R. Crim. P. Rule 40, or any other similar hearing following an arrest outside the prosecuting district, the prosecutor should make clear on the record that detention will be sought and take any other necessary steps to ensure that the defense has no colorable basis later to claim that there was a failure to meet the "first appearance" provision of § 3142(f). *See generally United States* v. *Valenzuela-Verdigo*, 815 F.2d 1011, 1013-16 (5th Cir. 1987) (detention hearing, although not held until 18 days after arrest, was not untimely where prosecutor in arresting district had requested pretrial detention and hearing date was set but subsequently delayed with apparent agreement of parties due to transfer of prisoner to charging district and schedule of defendant's counsel). However, failure to comply with the "first appearance" provision does not necessarily bar the court from detaining the defendant after the detention hearing. *See United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716- 17 (1990) ("Neither the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained."). *See also United States* v. *Moncada-Pelaez*, 810 F.2d 1008, 1009-10 (11th Cir. 1987) (where defendant was temporarily detained under § 3142(d), hearing could be held at any time within the 10-day temporary detention period).

26.4 Standard of proof

westlaw query 18 +S 3142(E) /P SAFETY OR APPEARANCE

The judge deciding a pretrial detention motion must order a defendant held without bail if it is shown that no condition or combination of conditions of release will reasonably

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assure *either* the defendant's appearance in court *or* the safety of the community or any individual. 18 U.S.C. § 3142(e). In other words, the key detention issue is whether a defendant's release poses such a danger to the community—or any specific person, such as a witness—or such a risk of flight, that he should be held in jail pending trial.

- Safety. Section 3142(f) provides that the government must prove "by clear and convincing evidence" that no conditions of release will assure the safety of the community or any individual.

- Appearance. Circuit Courts of Appeals have held the government must prove by a preponderance of the evidence that no conditions of release will assure the defendant's appearance in court as required. *See, e.g., United States v. Cisneros*, 328 F.3d 610, 616 (10th Cir. 2003); *United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996); *United States v. Kirk*, 992 F.2d 1218 (6th Cir.1993)(unpublished order); *United States v. Dillon*, 938 F.2d 1412, 1416 (1st Cir. 1991); *United States v. Araneda*, 899 F.2d 368, 370 (5th Cir. 1990); *United States v. King*, 849 F.2d 485, 489 (11th Cir. 1988); *United States v. Himler*, 797 F.2d 156, 161 (3d Cir. 1986); *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2d Cir. 1985); *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985); *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th Cir. 1985).

26.5 Detention hearing

westlaw query 18 +S 3142(F) /P 26.2 OR JENCKS

At a detention hearing, "the rules concerning the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing." 18 U.S.C. § 3142(f). However, the *Jencks* Act, 18 U.S.C. § 3500, does apply at pretrial detention hearings. *See* Fed. R. Crim. P. Rule 46(j) (Rule 26.2 generally applies to a detention hearing under § 3142) and Rule 26.2 (production of witnesses' statements). Thus, if a defendant is being prosecuted upon a criminal complaint following an arrest on probable cause, the court commonly will schedule a consolidated preliminary and detention hearing at which the prosecution must make available "Jencks" statements. If a

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defendant's detention hearing follows an indictment, the government may proceed solely by proffer without the need to call a witness, because the indictment itself establishes probable cause. *See, e.g.*, *United States* [redacted], [redacted] 39 Fed.Appx. 278, 278-79 (6th Cir. 2002); *United States* [redacted] *Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996); *United States* [redacted] *Trosper*, 809 F.2d 1107, 1110 (5th Cir. 1987); *United States* [redacted] *Vargas*, 804 F.2d 157, 163 (1st Cir. 1986); *United States* [redacted] *Suppa*, 799 F.2d 115, 117 (3d Cir. 1986); *United States* [redacted] *Dominguez*, 783 F.2d 702, 706 n. 7 (7th Cir. 1986); *United States* [redacted] *Contreras*, 776 F.2d 51, 52 (2d Cir. 1985); *United States* [redacted] *Hazime*, 762 F.2d 34, 37 (6th Cir. 1985); *United States* [redacted] *Hurtado*, 779 F.2d 1467, 1479 (11th Cir. 1985).

Practice notes.

1. In some instances, when proceeding by proffer, it may be tactically adroit to bring to the hearing a government witness, such as the supervising case agent, and make that witness available to the court or defense counsel if either wishes to obtain additional evidence or information. A witness thus being called by the court or defense counsel is not subject to the requirements of the *Jencks* Act. *See* Fed. R. Crim. P. Rule 26.2 (a).

2. In hearings at which the government will proffer evidence derived from intercepted communications, for example, from court-authorized "wiretaps," there is a requirement under "Title III,"18 U.S.C. § 2510-2522, more particularly § 2518(9), for ten-days' notice to the defendant. This can conflict with the three-day continuance limit under § 3142(f), which defense counsel may try to employ to preclude the proffer of evidence based upon wiretaps. Section 2518(9) itself provides for a waiver by the court of the ten-day period upon finding that it is not possible to furnish the information ten days before the hearing and that the delay will not be prejudicial. If the defendant insists on ten-days notice, this could constitute "good cause" to extend the time for a detention hearing beyond the statute's three day limit. *See United States* [redacted] *Salerno*, 794 F.2d 64, 70 (2d Cir. 1986).

26.6 Rebuttable presumptions

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westlaw query 18 +S 3142(E)

The most important section of the Bail Reform Act in drug prosecutions, after 18 U.S.C. § 3142(f)(1)(C), is 18 U.S.C. § 3142(e). This section provides for a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of the community where there is a showing of probable cause that:

(1) the defendant has committed a drug crime for which pretrial detention is authorized; that is, a violation of the Controlled Substances Act with a maximum term in prison of ten or more years, as well as crimes under the other two federal drug laws referred to in § 3142(f)(1)(C);

(1) the defendant has committed a violation of 18 U.S.C. § 924(c): using or carrying a firearm during and in relation to, or possessing a firearm in furtherance of, a drug-trafficking crime; and

(1) the defendant is a "released" or "recidivist" offender subject to a presumption applying to defendants who have recently committed detainable crimes while on pretrial release.

As noted above, an indictment itself constitutes a finding of probable cause. A second rebuttable presumption attaches to defendants accused of crimes identified in (1) and (2) above, that no condition or combination of conditions will reasonably assure the appearance of the person as required. § 3142(e).

Note. Although probable cause to believe that a defendant has committed an 18 U.S.C. § 924(c) crime gives rise to the presumptions, it is not obvious that a § 924(c) offense alone allows a § 3142(f) motion for pretrial detention. Given that committing a § 924(c) offense raises presumptions favoring detention, it would be a statutory anomaly if the charge did not authorize pre-trial detention under § 3142(f). Since a § 924(c) crime is not itself a violation of the Controlled Substances Act, if it is "detainable," it either must be (A) as a crime of violence under § 3142(f)(1)(A), or (B) as a crime with a

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maximum sentence of life imprisonment under § 3142(f)(1)(B). For purposes of bail, crimes of violence are defined in § 3156(a)(4), and it appears that § 924(c) would only qualify under § 3156(a)(4)(B), as a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Similarly, § 924(c)'s penalty provisions generally speak of mandatory minimum sentences, rather than explicitly authorizing a maximum sentence of life imprisonment. Nevertheless, § 924(c)(1)(C)(ii) does prescribe life imprisonment for a defendant convicted of the offense under certain circumstances. Moreover, Amendment 642 to the U.S. Sentencing Commission Guidelines Manual, which took effect November 1, 2002, reflects a decision to treat a § 924(c) offense as a "life crime" for purposes of the career offender sentencing enhancement. *See Amendments to the Guidelines Manual, Supplement to Appendix C*, 277-78 (November 1, 2002) (Amendment 642, "Reason for Amendment"). *See also United States v. Woodruff*, 296 F.3d 1041, 1049 (11th Cir. 2002). In the great bulk of situations, this is only of academic concern, but the anomaly can arise when a defendant is charged with a crime involving less than 50 kilograms of marijuana and a § 924(c) offense. As the marijuana charge is not a detainable offense (because the maximum penalty is five years in prison), a pretrial detention motion can only be made if the § 924(c) offense is an independent basis for pretrial detention. This also arises when the underlying drug-trafficking crime involves Schedule III, IV, or [redacted] controlled substances (which are not subject to a maximum punishment of imprisonment for ten years or more).

26.7 Temporary detention

westlaw query 18 +S 3142(D)(1)(A)

Another key provision of the Bail Reform Act is 18 U.S.C. § 3142(d), which authorizes periods of temporary detention of up to ten working days where the defendant commits an

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offense while on some form of judicial supervision, such as parole, probation, release pending sentencing, or pretrial release in a felony case. *See* § 3142(d)(1)(A)(i)-(iii). Most foreign nationals who do not have a "green card," that is, who are not lawfully admitted for permanent residence, are also subject to a ten-day hold. *See* § 3142(d)(B). The purpose of the temporary detention is to give supervising authorities—parole board, probation officer, trial judge, or the Bureau of Immigration and Customs Enforcement (formerly INS)—a chance to issue a warrant for the defendant. *See* § 3142(d). A motion for a ten-day hold imposes a duty on the government to notify the supervising authority of the defendant's new charge. *See* § 3142(d).

Practice notes.

- When the government seeks both a detention hearing after a three-day continuance, § 3142(f), and also temporary detention, § 3142(d), the court may effectively combine the two matters and set a consolidated hearing within the ten-day period, but later than the three days permitted for a strictly pretrial detention hearing. Or the court may construe the time limits more narrowly and require a detention hearing in three days, even though the defendant will nevertheless remain jailed after the three days elapse pursuant to the ten-day hold. Under either view, however, ten-day holds do not "tack," and a defendant who satisfies more than one ground for temporary detention under § 3142(d) may only be detained for a total of ten days.

- Section 3142(d) requires two findings for temporary detention: (a) that the defendant is on some form of release or not a lawful U.S. resident, and (b) that the defendant may be a danger to the community or a risk of flight. As a result, some judges may conclude that they have discretion to deny a motion for temporary detention, even when it is clearly established that a defendant is on parole, probation, or pretrial release for a felony. Although this question may arise in non-drug cases, it should not be an issue in narcotics prosecutions because of the rebuttable presumptions that the defendant is a danger and risk of flight.

- Section 3142(d)(1)(A)(i) authorizes temporary detention only for defendants released before trial in *felony* cases, not misdemeanors, but under § 3142(d)(1)(A)(ii), any defendant facing sentence or released pending appeal may be held for up to ten days.

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26.8 Other bases for denying bail

Even though a serious narcotics charge itself is sufficient for pretrial detention, employing one or more of the other five bases for denying bail can bolster the government's case for detention. Consequently, sound litigating tactics suggest moving for pretrial detention on every applicable ground available under § 3142(f):

1. Where there is a serious risk that a defendant might try to obstruct justice, § 3142(f)(2)(B), for example, by attempting to influence, intimidate, or harm a witness or juror. This is a valuable additional ground upon which to seek pretrial detention, and is often available in drug cases—it focuses the Court's attention on a threat to a specific, live person, rather than on the more generalized notion of community safety;

2. Where a defendant is also charged with a crime of violence, § 3142(f)(1)(A)), as often is the case in RICO and CCE prosecutions based upon narcotics conspiracies;

3. Where a defendant is a serious risk of flight, § 3142(f)(2)(A), there is no drawback to specifically seeking detention on this ground, in addition to relying on the presumption that drug defendants are a risk of flight;

4. Where a defendant is also charged with an offense for which the maximum sentence is life imprisonment or death, § 3142(f)(1)(B); and

5. Where the "recidivist" provision of § 3142(f)(1)(D) authorizes pretrial detention if a defendant has previously committed two or more "detainable offenses"; that is, crimes which themselves would have permitted a pretrial detention motion under § 3142(f)(1). As fairly few defendants have extensive federal criminal records, this provision also incorporates state and local convictions that would have been detainable had they been subject to federal jurisdiction. 18 U.S.C. § 3142(f)(1)(D). As a result, a defendant with two or more serious state drug felonies or crimes of violence (or one of each) is subject to pretrial detention independent of the maximum sentence of the current federal felony narcotics charge.

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Practice note. When litigating a pretrial detention motion, the legislative history of the 1984 Bail Reform Act is a fertile source of authority. For example, it confirms the argument that the law reflects a congressional intent to detain defendants who commit crimes while on pretrial release or who are recidivist offenders. *See* S.Rep. No. 98-225, at 307 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182. Among its useful language is:

> The Committee also notes, with respect to the factor of community ties, that it is aware of the growing evidence that the presence of this factor does not necessarily reflect a likelihood of appearance, and has no correlation with the question of the safety of the community. . . . [T]he Committee wishes to make it clear that it does not intend that a court conclude that there is no risk of flight on the basis of community ties alone . . . .

Id., 1984 U.S.C.C.A.N. at 3207.

> Under current law, consideration of a defendant's criminal history is confined to his record of convictions. While a prior arrest should not be accorded the weight of a prior conviction, the Committee believes that it would be inappropriate to require the judge in the context of this kind of hearing to ignore a lengthy record of prior arrests, particularly if there were convictions for similar crimes. . . . In any event, independent information concerning past criminal activities certainly can, and should, be considered by a court.

Id. at 3206 n.76 (citations omitted).

26.9 Nebbia hearings

If a monetary or property bond is set, the prosecution may request the court to order that—before the release of the defendant—a *Nebbia* hearing be held to determine whether the collateral for the court (or the collateral provided the bail bondsman) is tainted. *See*

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18 U.S.C. § 3142(g)(4); *United States* v. *Nebbia*, 357 F.2d 303 (2d Cir. 1966). *See also United States* v. *Patel*, 1995 WL 557379 (N.D. Ill. 1995) (unpublished memorandum opinion and order) (notwithstanding the tax returns and testimony tendered by the defense, the defense failed to convincingly establish that the properties offered as security for the bond "were purchased solely with legitimate funds"). *Nebbia*-type hearings are particularly important when someone other than the defendant is posting the collateral, as they present an opportunity for the judge to establish on the record that the sureties are bona fide and understand the risks they are undertaking, such as potential loss of their property. *See generally United States* v. *Noriega-Sarabia*, 116 F.3d 417, 420-21 (9th Cir. 1997). *See also United States* v. *Hammond*, 204 F.Supp.2d 1157, 1166-67 (E.D.Wis. 2002) (sufficiency of the security offered).

26.10 Resources

The main treatise on federal detention and bail law is: Hon. John L. Weinberg, *Federal Bail and Detention Handbook* (2003), which is updated regularly. Another source collecting decisions on detention cases is: *Propriety of denial of pretrial bail under Bail Reform Act*, 75 A.L.R. Fed. 806. Links to relevant internal DOJ monographs and memoranda appear on the USABook Bail and Release topic page at http://10.173.2.12/usao/eousa/ole/tables/subject/bail.htm.

26.11 Acknowledgments

This Chapter was adapted and updated from material originally written by then Senior Trial Attorney Robert Lipman, NDDS, for the 1999 edition of *Federal Narcotics Prosecutions*.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. _____

UNITED STATES OF AMERICA

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

Notice of Appeal From Magistrate's Order Denying Pre-Trial Detention

Comes now the United States of America, by and through its undersigned Assistant United States Attorney, and files this Notice of Appeal from the Order of United States Magistrate Judge _____, U.S. District Court for the _____ District of _____, entered on April ____, 2008, which denied the United States' request for pre-trial detention as to defendant Jeffrey Epstein.

United States Magistrate Judge _____ set a $_____ cash bond, with the following conditions: _____. The United States gave notice of its intent to appeal the bond order and asked the Magistrate Judge to stay execution of the bond pending the Court's determination of this appeal. The Magistrate Judge granted the motion and the defendant remains in custody.

Pursuant to 18 U.S.C. § 3145(a), if "a person is ordered released by a magistrate judge, or by a person other than a judge of a court having original jurisdiction over the offense . . . the attorney for the Government may file, with the court having original jurisdiction over the offense, a motion

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for revocation of the order or amendment of the conditions of release." Accordingly, the United States hereby files this emergency motion with the District Judge assigned to the case for immediate revocation of the Magistrate Judge's Order.

THE CHARGES IN THE INDICTMENT

On April ___, 2008, a Grand Jury sitting in the Southern District of Florida returned a twenty-nine-count indictment charging defendant Jeffrey Epstein[1] with one count of conspiracy to use a means of interstate commerce to persuade, induce, or entice nineteen minors to engage in prostitution, in violation of 18 U.S.C. § 371; eight counts of knowingly, in and affecting commerce, recruiting, enticing, and obtaining eight minors to engage in commercial sex acts, in violation of 18 U.S.C. § 1591(a)(1); twelve substantive counts of using a means of interstate commerce to persuade, induce, or entice twelve minors to engage in prostitution or other criminal sexual activity, in violation of 18 U.S.C. § 2422(b); one count of conspiracy to travel in interstate commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(e); and four counts of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a person under 18 years of age, in violation of 18 U.S.C. § 2423(b). Jane Does #1 through #19 were all minors at the time of their involvement with defendant Epstein. Jane Doe #11 was a resident of New York; the remaining Jane Does were all residents of Palm Beach County, Florida, at the time of their involvement with defendant Epstein.

Count 1 carries a statutory maximum sentence of five years' imprisonment. Counts 2 through 10 each carry a statutory maximum sentence of forty years' imprisonment. Counts 11 through 23 each carry a statutory mandatory minimum sentence of five years' imprisonment up to

[1]Epstein is named as a defendant in twenty-seven counts.

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a maximum of thirty years' imprisonment. Counts 24 and 26 through 29 each carry a maximum of thirty years' imprisonment.

THE FACTS OF THE OFFENSE

The investigation of Jeffrey Epstein initially was undertaken by the City of Palm Beach Police Department in response to a complaint received from the parents of a 14-year-old girl, S. G.,[2] from Royal Palm Beach. When S. G. and another girl began arguing at school because the other girl accused S. G. of being a prostitute, one of the school principals intervened. The principal searched S. G.'s purse and found $300 cash. The principal asked S. G. where the money came from. [redacted] initially claimed that she earned the money working at "Chik-Fil-A," which no one believed. [redacted] then claimed that she made the money selling drugs; no one believed that either. [redacted] finally admitted that she had been paid $300 to give a massage to a man on Palm Beach Island. [redacted] parents approached the Palm Beach Police Department ("PBPD") about pressing charges.

PBPD began investigating the recipient of the massage, Jeffrey Epstein, and two of his assistants, Sarah Kellen and Nadia Marcinkova. PBPD identified approximately 27 girls who went to Epstein's house to perform "sexual massages" (not including one licensed massage therapist) or who recruited girls to do the same. The girls' ages ranged from 14 years' old to 23 years' old. Some girls saw Epstein only once and some saw him dozens of times. The "sexual massages" performed also varied. Some girls were fully clothed while they massaged Epstein; some wore only their underwear; and some were fully nude. During all of these massages, Epstein masturbated himself and he would touch the girl performing the massage, usually fondling their breasts and touching their

[2]S.G. currently is not one of the Jane Does referenced in the indictment.

FN These are the statutory maximums and minimums in effect at the time of the charged activity. Many of these statutes now carry significantly stiffer penalties.

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vaginas - either over their clothing or on their bare skin. Epstein often used a vibrator to masturbate the girls and digitally penetrated a number of them. For the girls who saw him more often, Epstein graduated to oral sex and vaginal sex. Epstein sometimes brought his assistant/girlfriend, Nadia Marcinkova, into the sexual activity.

On October 18, 2005, PBPD obtained a search warrant with the assistance of the Palm Beach County State Attorney's Office ("PBSAO"). By this time, PBSAO had already been contacted by Epstein's cadre of lawyers. When PBPD arrived at Epstein's home two days later (10/20/05) to execute the search warrant, they found several items conspicuously missing. For example, computer monitors and keyboards were found, but the CPUs were gone. Similarly, surveillance cameras were found, but they were disconnected and the videotapes were gone. Nonetheless, the search did recover some evidence of value, including message pads showing messages from many girls over a two-year span. The messages show girls returning phone calls to confirm appointments to "work." Messages were taken by Sarah Kellen, Nadia Marcinkova, and Adriana Ross. The search also recovered numerous photos of Epstein sitting with naked girls whose ages are undetermined.

Photographs taken inside the home show that the girls' descriptions of the layout of the home and master bedroom/bathroom area are accurate. PBPD also found massage tables and oils, the high school transcript of one of the girls, and sex toys.

In sum, the PBPD investigation showed that girls from a local high school would be contacted by one of Epstein's assistants to make an appointment to "work." Up to three

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appointments each day would be made. The girls would travel to Epstein's home in Palm Beach where they would meet Epstein's chef and Epstein's assistant–usually Kellen–in the kitchen. The assistant normally would escort the girls upstairs to the master bedroom/bathroom area and set up the massage table and massage oils. The assistant would leave and Epstein would enter the room wearing a robe or a towel. He would remove the clothing and lie face down and nude on the massage table. Epstein would then instruct the girl on what to do and would ask her to remove her clothing. After some time, Epstein would turn over, so that he was lying face up. Epstein would masturbate himself and fondle the girl performing the massage. When Epstein climaxed, the massage was over. The girl was instructed to get dressed and to go downstairs to the kitchen while Epstein showered. Epstein would pay the girl–usually $200–and if it was a "new" girl, would ask for the girl's phone number to contact her in the future. Girls were encouraged to find other girls to bring with them. If a girl brought another girl to perform a "massage," each girl would receive $200.

The PBPD investigation consists primarily of sworn taped statements from the girls. When PBPD began having problems with PBSAO, they approached the FBI. The investigation was formally presented to FBI and to me after PBSAO "presented" the case to a state grand jury and that grand jury returned an indictment charging Epstein with three counts of solicitation of prostitution.

The State of Florida has since dismissed its charges after the United States initiated prosecution.

ARGUMENT

The defendant was arrested in the Northern District of Texas and, today, had a bond hearing. The United States sought to have the defendant detained pending trial based upon the presumption

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of detention as well as the defendant's risk of flight and danger to the community.

This is a case where detention is presumed, both as to risk of flight and as a danger to the community. The law regarding this presumption is as follows:

> Where the Court finds probable cause to believe that the defendant committed one of the offenses listed in 18 U.S.C. § 3142(e), [which includes the violations of 18 USC 2242 and 2243 as charged by the grand jury][3]
>
> a statutory rebuttable presumption arises that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community. Assuring a criminal defendant's appearance at trial is a legitimate government objective. Detaining adults who prey on children for the adult's sexual gratification or for the production of child pornography is also a legitimate government objective. One of the fundamental duties of government is public safety, including protecting children from sexual predators. . . . Once it is determined that the presumption applies, the defendant bears a limited burden of production to rebut that presumption by coming forward with evidence he does not pose a danger to the community or a risk of flight. Once a defendant has met his burden of production relating to these two factors, the presumption favoring detention does not disappear entirely, but remains a factor to be considered among those weighed by the district court.

United States [redacted]. Abad, 350 F.3d 793, 797 (8th Cir. 2003) (internal citations omitted).

In determining how much weight to accord the presumption after the defendant has come forward to meet his burden of production, the Second Circuit explains:

> A judicial officer conducting a detention hearing should, even after a defendant has come forward with rebuttal evidence, continue to give the presumption of flight some weight by keeping in mind that Congress has found that these offenders [who fall within the presumption] pose special risks of flight, and that "a strong probability arises" that no form of conditional release will be adequate to secure their appearance. The judge of magistrate thus should consider those legislative findings among the other factors to be weighed in deciding whether a defendant should be detained.

United States [redacted]. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986) (internal citations omitted) (discussing

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[3]A grand jury indictment provides the probable cause required by the statute to trigger the presumption. United States [redacted]. Hurtado, 779 F.2d 1467 (11th Cir. 1985); United States [redacted]. Quartermaine, 913 F.2d 910 (11th Cir. 1990).

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narcotics defendants).

In United States v. Sciacca, one of the district judges in the Southern District of Florida summarized the Eleventh Circuit's approach to the analysis of the presumption as follows. Once it is determined that the statutory presumption applies based upon the crime charged, then

> "the defendant carries the burden of production to come forward with evidence to rebut the presumption." United State v. Quartermaine, 913 F.2d 910, 916 (11th Cir. 1990). Although the statutory presumption places a burden of production on a defendant, the burden of persuasion concerning the dangerousness [or risk of flight] remains on the government. United States v. King, 849 F.2d 485, 488 (11th Cir. 1988). . . . The kind of evidence which a defendant must produce to satisfy his burden of production must "suggest that he . . . [is] either not dangerous or not likely to flee if turned loose on bail." United States v. Hurtado, 779 F.2d 1467, 1479 (11th Cir. 1985). If the defendant produces such evidence, the presumption does not disappear but "remains in the case as an evidentiary finding militating against release, to be weigh[ed] along with other evidence relative to factors listed in section 3142 (g). United States v. King, 849 F.2d 485, 488 (11th Cir. 1988).

Sciacca, (unpublished opinion), Court File No. 03-80164-Cr-Hurley, at pp. 4-5 (S.D. Fl. Feb. 25, 2004).

Here, the defendant's blatant disregard of the order of the Florida court regarding his contact with the victim shows his continued dangerousness. In addition, there is evidence that he is having "romantic" chats with other minors, including one located in Texas.

Furthermore, in considering a defendant's risk of flight, the Court must consider the defendant's ties to the community where the prosecution occurs, not merely his ties to the United States at large or the district in which he is arrested. See, e.g., United States v. Adipietro, 773 F. Supp. 1270 (W.D. Mo. 1991). The only tie that the defendant has to the Southern District of Florida is the victim in this case. He is not employed here, does not live here, and does not attend school here. The defendant's lack of ties to the Southern District of Florida and the amount of time that he

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will be facing on federal charges also are evidence of an incentive to flee. Count 1 of the indictment carries a five year mandatory minimum sentence, up to a maximum of 30 years, and Count 2 carries a maximum of 30 years. Both also carry a recommended supervised release term of life.

The United States Magistrate Judge in the Northern District of Texas considered these factors and determined that a $12,000 cash bond was sufficient to secure the safety of the community in the Southern District of Florida and to secure the defendant's appearance at trial.

For the foregoing reasons, the United States respectfully requests that the Court revoke the order of the Magistrate Judge and order the defendant detained pending his intial appearance in the Southern District of Florida.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by facsimile this 21st day of April, 2006, to Heidi Perlett, Esq. Counsel for Defendant.

_____

A. MARIE VILLAFAÑA

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ASSISTANT UNITED STATES ATTORNEY

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Memorandum

Subject	Date
Third Supplement to Prosecution Memorandum: Operation Leap Year: United States [redacted]. Jeffrey Epstein, et al.	2/19/08

To:
Robert Senior, Chief, Criminal Division
Rolando Garcia, Deputy Chief, Criminal Division
Karen Atkinson, Chief, Northern Region

From:
A. Marie Villafaña

cc:
Drew Oosterbaan
Myesha Braden

INTRODUCTION

This third supplement summarizes the changes to the indictment and prosecution memo since the first presentation in May 2007. The most significant changes are the exclusion of some victims and the inclusion of newly discovered victims. The order of the indictment also has been changed.

For the reasons set forth below, a number of girls who were originally considered for the indictment are being excluded at this time. Some may be re-added, but, for strategic reasons, I believe that this indictment should focus on victims who are unknown to Epstein's counsel. Of the nineteen victims listed in this indictment, eleven were *not* part of the State investigation. Only one of the girls who testified in the state grand jury is included in our list. We believe that approximately eight of these girls are unknown to the defense.

I. VICTIMS DELETED FROM THIS INDICTMENT

A. Persons Recruited by [redacted] R. – [redacted] G., [redacted] P., [redacted] L., [redacted] S., and [redacted] L.

Myesha Braden and I have discussed the possibility of removing [redacted] R. and her recruits entirely from the indictment because of the amount of press coverage that [redacted] has received over her statement to police that she was "like Heidi Fleiss." [redacted] has been very unwilling to speak to us and, even after assurances that she would be treated as a victim, she insisted on full immunity before she would meet. Excluding [redacted] also removes much of the ammunition about Detective Recarey and alleged misrepresentations of [redacted]

statements to Recarey. [redacted] also was the person who instructed the girls to say they were 18. The evidence related to girls outside her group about knowledge of age is stronger and will weaken their defense that Epstein had a rule that all of the girls had to be over 18.

By removing [redacted] and treating her as an unindicted co-conspirator, we also make it easier to introduce discussions between [redacted] and the other defendants and [redacted] statements to others under the co-conspirator exception to the hearsay rule.

Applying this approach would result in the potential removal of seven victims ([redacted] plus six others). I have removed six for the following reasons:

First, I have removed [redacted] G. [redacted] was 14 years' old when she was brought to Epstein's home by [redacted] R., one of the Epstein's main recruiters. At [redacted] instruction, [redacted] lied to Epstein about her age–telling him that she was an eighteen-year-old senior at Wellington High School. In her statements to the Palm Beach Police Department and the state grand jury, [redacted] admitted that Epstein masturbated in her presence and placed a massager/vibrator on her vagina. In [redacted] statement to [redacted] immediately after leaving Epstein's home, and in her statement to the FBI and AUSA Villafaña, [redacted] admitted that Epstein digitally penetrated her. Epstein's criminal activity came to light when [redacted] stepmother learned of a fight between [redacted] and a friend at school over $300 cash found in [redacted] purse. [redacted] cooperated with the Palm Beach Police and made recorded telephone calls with [redacted] to set up a second "massage" with Epstein. Handwritten notes were found in Epstein's trash confirming this second meeting.

Despite all of this corroborating evidence, [redacted] is not being included (for now, at least) because her father, and stepmother have filed a civil suit against Epstein seeking "in excess of 50 million dollars." [redacted] father is represented by Jeff Herman. [redacted] father also has been in frequent contact with the journalist at "Vanity Fair" magazine, and, as mentioned in the original pros memo, he has a prior federal fraud conviction. After the suit was filed, [redacted] mother filed a motion to intervene and to stay the proceedings until [redacted] turns 18. In her affidavit, [redacted] mother avers that [redacted] and her father have been estranged for several months, and that [redacted] neither knew nor approved of the filing of the lawsuit. If [redacted] mother is correct, we may decide to add [redacted] into a superseding indictment, but for now the safer course is to exclude allegations related to her.[1]

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[1] We are monitoring the status of the litigation and intend to subpoena transcripts of relevant depositions. There also is a possibility that Epstein's attorneys have violated federal law by distributing to the press identifying information about a child sex abuse victim and by harassing that

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[redacted] and [redacted] were brought by [redacted] and their appointments were made between Kellen and [redacted] performed one massage and [redacted] performed two. For both girls, Epstein masturbated and tried to touch them but they refused. With [redacted] S., Epstein became upset that she wouldn't engage in more sexual activity and he told [redacted] not to bring her back. Because of the highly probative nature of this testimony related to Epstein's intent (i.e., no sex/no money), I believe that [redacted] testimony will be admitted under Rule 404(b).

[redacted] L. has been identified as the plaintiff in the second civil lawsuit filed against Epstein by Jeff Herman. She was 16 years old when she first went to Epstein's home and was recruited by [redacted] L., one of [redacted] friends. [redacted] L. only went to Epstein's home once, never told Epstein her age, and was never contacted directly by any of the defendants. [redacted] contribution to the indictment is outweighed by the presence of the civil suit, so she has been removed.

[redacted] is another girl whom [redacted] recruited. [redacted] was 16 when she first went to Epstein's home. She has admitted to providing massages and that Epstein touched her breast and attempted to touch her vagina. [redacted] denies any additional sexual activity. [redacted] recruited one other girl, Shasdy [redacted]., when Shasdy was 17. Shasdy lives in Venezuela and has not responded to efforts to contact her. The concern with [redacted] is that she will never completely admit to the sexual activity that occurred. Phone records show that [redacted] spoke with Sarah Kellen and Nadia Marcinkova more than 60 times. Yet [redacted] insists that she never provided massages fully nude and Epstein never digitally penetrated her, touched her vagina, or used the massager/vibrator on her. From all of the evidence, it is highly unlikely that Epstein would have allowed [redacted] to return so frequently without increasing the level of sexual activity. As one of the other girls reported, [redacted] reputation at school was that she "was a virgin the day she graduated." I believe that it will be too difficult for her to give up that persona and admit to everything that happened.

[redacted] will still remain as a witness, because she can corroborate many of the statements made by Vanessa Z. Fayth often drove [redacted] to Epstein's home and she knew that Epstein gave a vibrator to [redacted] and that Epstein offered to take [redacted] to New York and to his island. [redacted] knew of other gifts given to [redacted], including [redacted] Secret lingerie, birthday flowers, and a rental car.

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victim. A motion may be filed before Judge Marra on the issue of inappropriate contact with and harassment of [redacted].

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The one [redacted] recruit whom I have kept in the indictment is [redacted] Z. She is currently attending Lynn University on a soccer scholarship. The documentary evidence related to [redacted] is strong – numerous message pads, including one saying that [redacted] will be late because of soccer practice, car rental records, 156 calls with Sarah Kellen, 2 calls with Adriana Ross, 13 calls to Epstein's house, and 20 calls to Epstein's Palm Beach property manager. Epstein also gave [redacted] a vibrator and lingerie for her 18th birthday.

B. [redacted] M.

Although I never intended to use [redacted] M. as a witness, I did refer to her as one of the Jane Does in the indictment in connection with a massage that she gave together with [redacted] L. ([redacted] can testify as an eyewitness.) In light of the outcry from Epstein's attorneys that [redacted] does not consider herself a victim, I have used her initials instead.

II. VICTIMS ADDED TO THIS INDICTMENT

A. [redacted] H. (Jane Doe #4), [redacted] C. (Jane Doe #5), and [redacted] P. (Jane Doe #6)

Jane Does #4 and #5 traveled to Epstein's home together while they were students at Wellington High School. Both had heard at the school that you could get money for massaging Epstein. When they arrived at Epstein's home, they were met by Kellen, who took them on a tour of the house before leading them to Epstein's bedroom. Both sat on the couch until Epstein arrived. He arrived shortly thereafter and took a shower. Before he stepped into the shower, Epstein told the girls to get undressed. Jane Doe #4 removed her top and pants; Jane Doe #5 only removed her top.

After the girls massaged his back and legs, Epstein turned over and began masturbating. Epstein tried to reach down Jane Doe #5's pants, and she backed away. Epstein then instructed Jane Doe #4 to play with his nipples while he masturbated. After he ejaculated, Epstein told the girls to get dressed. He paid each girl $200.

Afterwards, Kellen attempted to contact Jane Doe #5 multiple times to set up appointments, but she refused. Jane Doe #4 returned, and on her second visit she massaged Epstein alone while wearing only her panties. When he began masturbating, Epstein placed Jane Doe #4 on the massage table, pushed her underwear to one side, and stroked her vagina. He also fondled her breasts. Jane Doe #4 received another $200. At some point during her visits, Epstein asked Jane Doe #4 how old she was, and she told him her true age (17).

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Jane Doe #4 recruited Jane Doe #6. On one occasion in the Spring of Jane Doe #6's junior year, when Jane Doe #6 was 16 years old, she and Jane Doe #4 went to Epstein's house together. Epstein asked Jane Doe #6 what high school she went to and Jane Doe #6 answered Palm Beach Central High School. Jane Doe #4 took Jane Doe #6 upstairs and told her to remove her clothing. Both girls were wearing only their panties when Epstein entered. Epstein laid down and both girls began massaging him. Epstein then asked Jane Doe #4 to leave. After she left, Epstein began masturbating and grabbing Jane Doe #6, touching her all over. When Jane Doe #6 pulled away, Epstein would grab her and pull her closer. Epstein both digitally penetrated Jane Doe #6 and placed the vibrator/massager on her vagina. Jane Doe #6 was paid $200, but cannot remember who handed the money to her.

Jane Doe #6 never returned, but Jane Doe #4 went a few more times. Jane Doe #4 explained that Kellen would always call to set up the appointments.

Jane Does #4, #5, and #6 are all referenced in the overt acts section of the indictment. The only telephone contact initiated by Epstein's group that resulted in sexual conduct was between Jane Doe #4 and Kellen, so Jane Doe #4 is the subject of one of the substantive enticement counts. Also, because Jane Doe #4 told Epstein her true age, I have added a substantive sex trafficking charge related to Jane Doe #4.

B. [redacted] E. (Jane Doe #8)

Jane Doe #8 was recruited by [redacted] in approximately July 2004, when Jane Doe #8 was 17. [redacted] told Jane Doe #8 that she knew a "filthy rich guy" who would pay girls $200 to $300 for giving a massage. [redacted] took Jane Doe #8 to Epstein's home in a taxi. Epstein took a shower before starting the massage and instructed Jane Doe #8 to remove her shirt. Epstein began masturbating and rubbed Jane Doe #8's vagina over her panties before pushing the underwear aside to stroke her vagina. Epstein told Jane Doe #8, "this is normal, nothing's wrong." Epstein paid Jane Doe #8 $200 to $300. During the ride home, [redacted] told Jane Doe #8 that she had been paid and said, "if you bring someone, you'll get $200."

Kellen called about a week later inviting Jane Doe #8 to return and telling her that Epstein would pay if she brought a friend. Kellen called Jane Doe #8 eight or nine times. Jane Doe #8 finally told Kellen that she moved out of state to stop her from calling. According to Kellen's phone records, Kellen called Jane Doe #8 four times in one day when Epstein was in town.

Jane Doe #8 is referenced in the overt acts section of the indictment and in one of the

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substantive counts of travel in interstate commerce to engage in illicit sexual activity.

C. [redacted] B. (Jane Doe #11)

Jane Doe #11 is the first fully-identified New York high school girl. She only provided one massage, but became a recruiter for Epstein. Jane Doe #11 first went to Epstein's home towards the end of her junior year, when she was seventeen years old. After that first massage, Epstein told Jane Doe #11 that he would pay her to bring more girls.

Jane Doe #11 implicates two other Epstein assistants – Lesley Groff and Cecilia Steen. We had anticipated that Groff would be a witness, not a target. When the agents went to Groff's house to interview her, she went upstairs, claiming she needed to change her baby's diaper. While upstairs, she called Epstein, causing Epstein to re-route his flight to take Kellen and Marcinkova back to his island. (They were scheduled to fly to New Jersey, where the agents had planned to serve Kellen and Marcinkova with target letters.) After this meeting with Groff, Epstein's team began negotiating in earnest to end this investigation.

FBI New York agents are interviewing several girls identified by Jane Doe #11. At this time, we do not have Lesley Groff's phone records, so we do not have sufficient evidence to charge her. She is referred to by her initials in the indictment, and we will hopefully be ready to charge her when we supersede the indictment.

Jane Doe #11 is referenced in the overt acts but is not part of any substantive counts.

D. [redacted] A. (Jane Doe #18) and [redacted] H. (Jane Doe #19)

Jane Doe #18 was recruited by her brother's friend, Tony Figueroa (referred to in indictment as "A.F."). Figueroa also was the former boyfriend of [redacted] (Jane Doe #1). Figueroa recruited several girls to Epstein's home, including [redacted] R. Jane Doe #18 attended Royal Palm Beach High School with [redacted] and [redacted] recruits. Jane Doe #18 knew that [redacted] and the other girls were going to Epstein's house, but they did not know about Jane Doe #18.

Figueroa told Jane Doe #18 that she would receive $200 for providing a massage and that she should tell Epstein that she was 18, if he asked. (Epstein never asked.) Figueroa drove Jane Doe #18 to Epstein's house. Jane Doe #18 describes a similar pattern of activity as that faced by the other victims, with Epstein pushing for more clothes to be removed and more sexual activity with each visit. On her second-to-last visit, Epstein walked Jane Doe

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#18 over to a couch, forcibly pushed her panties aside, and digitally penetrated her, without her consent. Jane Doe #18 is still traumatized by this event. She reports that she went through a period of using drugs, but now she is clean and is studying to be a nurse. Jane Doe #18 is only about five feet tall and looks barely eighteen now. She is very concerned about her family finding out about what happened to her, but she is strongly committed to Epstein's prosecution.

What seems most devastating to Jane Doe #18 is that she returned to Epstein's house after the forcible digital penetration and brought her friend, Jane Doe #19. Jane Doe #19 massaged Epstein's back and legs. When he turned over, Epstein asked Jane Doe #19 to remove her shirt. She refused and he became upset and ended the massage. Epstein then sent for Jane Doe #18 and reprimanded her for not telling Jane Doe #19 that she would have to perform the massage topless.

When Jane Does #18 and #19 left, they called the Royal Palm Beach Police Department, who referred them to the Palm Beach Police. Jane Does #18 and #19 spoke with someone there and reported what happened. After much searching, the Palm Beach Police Department was able to locate a report of this call. The report contains Epstein's name and address and the names of both girls and describes Epstein as paying $200 for a massage. The girls complained that Epstein insisted that they take off their tops and pants, even though he knew that they were 17. The date of the report is March 5, 2004, less than two weeks after Jane Doe #18's eighteenth birthday, and when Jane Doe #19 was seventeen years old. [NB: The police report describes a pattern of activity, including dates when Jane Doe #18 was seventeen years old.] Neither Jane Doe #18 nor #19 ever returned to Epstein's home.

Although we have not yet obtained Jane Doe #18's telephone records, we were able to identify her telephone number, and there are twenty telephone calls that appear on Sarah Kellen's phone records. All of those calls were outgoing (meaning Kellen called Jane Doe #18.) The telephone calls range in date from August 27, 2003 through March 3, 2004. The phone number is the same one that Jane Doe #18 provided to the Palm Beach Police Department when she made the report against Epstein. Kellen never again called Jane Doe #18 after JD#18 made the report to the Palm Beach Police Department.

Both Jane Doe #18 and Jane Doe #19 appear in the overt acts portion of the Indictment. In addition, a count of use of the telephone to entice Jane Doe #18 to engage in prostitution has been added. There was no direct telephone contact between Kellen and Jane Doe #19, so a substantive count has not been added related to her.

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III. OTHER CHANGES TO INDICTMENT

The overt acts are now organized by victim, or if a group of victims are related, then by group, followed by a separate listing of Epstein's travel to Palm Beach. This should make the indictment much easier to follow. I also have selected telephone calls that are more closely linked to the dates of the sexual activity rather than focusing exclusively on calls near flights. The number of overt acts has not significantly decreased for the following reason. First, as an initial filing, the included overt acts provide a complete picture of Epstein's behavior. The Grand Jury's determination that there is probable cause to believe that all of the acts were committed should help persuade the Magistrate Judge and the District Judge that Epstein is a danger to the community and that the evidence against Epstein is strong. Second, there are cases that suggest that, when a certain number of overt acts are charged in a conspiracy count, but the Government seeks to introduce a large number of uncharged overt acts, those uncharged acts can serve as a variance from/amendment to the Indictment. One of those cases was argued by Gerald Lefcourt – one of Epstein's attorneys. For those reasons, I have kept most of the overt acts from the original indictment (excluding those related to the Jane Does who have been dropped from the indictment) and have added acts related to the new Jane Does. I still plan to supersede the indictment with information about additional Jane Does from New York or elsewhere and with potential money laundering counts and computer-related counts when those phases of the investigation are completed. At the time I supersede, the overt acts can be reduced.

The counts have been reorganized based upon discussions with Myesha Braden from the Child Exploitation Section. She believes that our strongest counts are the child sex trafficking violations (18 U.S.C. § 1591). I have moved those counts forward in the indictment.

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C
U.S. [redacted]. DiVarco
D.C.Ill.,1985.

United States District Court, N.D. Illinois, Eastern Division.
UNITED STATES of America, Plaintiff,
[redacted].
Joseph DiVARCO, et al., Defendants.
No. 84 CR 507.

Feb. 6, 1985.

After conviction by jury on all counts in which each defendant was named in indictment, Government moved for **detention** of each of them pursuant to Bail Reform Act, claiming each of them was likely to pose danger to safety of other persons or community if released. Defendants moved for release from **detention**, launching number of constitutional attacks on statute. The District Court, Shadur, J., held that: (1) Bail Reform Act did not violate Eighth Amendment's proscription on excessive bail; (2) Act did not violate due process on ground it was vague or lacked standards; (3) Act did not violate equal protection; (4) **detention** pending sentencing did not violate defendants' right to counsel; and (5) application of law to defendants did not constitute ex post facto violation.

Motions for release on bail denied.

West Headnotes

[1] Bail 49 ⇦52

49 Bail
49II In Criminal Prosecutions
49k50 Amount of Bail
49k52 k. Excessive Bail. Most Cited Cases
Provision of Bail Reform Act which imposes upon defendant burden of showing by clear and convincing evidence that he is not likely to pose danger to safety of other persons or community if released on bail does not violate Eighth Amendment prohibition on excessive bail. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3143(a).

[2] Bail 49 ⇦39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases
Although statute requiring that presentence convicted defendant establish by clear and convincing evidence that he is not likely to pose danger to safety of other persons or community if released under Bail Reform Act did not specify procedures to be followed, it was not invalid on ground it was vague or lacked standards, where requirement of judicial officer's finding by clear and convincing evidence necessarily connoted hearing, and clear implication of statute was that neighboring provisions dealing with hearings for presentence **detention** and specifying factors to be considered in such hearings, including safety or danger of others and community applied to presentence defendant as well. 18 U.S.C.A. §§ **3142**(b, c, f, g), 3143(a).

[3] Statutes 361 ⇦47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
Congress is not required to substitute particular for generic or to give term more

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precise content by giving examples or by establishing laundry list.

[4] Constitutional Law 92 ⚿889

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(A) Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)10 Due Process
92k888 Criminal Law
92k889 k. In General. Most Cited Cases
(Formerly 92k42.1(3))
Defendants challenging provision of Bail Reform Act requiring that presentence convicted defendant establish by clear and convincing evidence that he is not likely to pose danger to safety of other persons or community if released on bail could not challenge constitutionality of statute on ground that term "danger" lacked meaning as to them, where defendants were tied by testimony to gangland-type assassinations and with potential for retaliation against witnesses. 18 U.S.C.A. §§ **3142**(b, c), 3143(a).

[5] Bail 49 ⚿49(4)

49 Bail
49II In Criminal Prosecutions
49k49 Proceedings to Admit to Bail
49k49(3) Evidence
49k49(4) k. **Presumptions** and Burden of Proof. Most Cited Cases

Bail 49 ⚿49(5)

49 Bail
49II In Criminal Prosecutions
49k49 Proceedings to Admit to Bail
49k49(5) k. Hearing and Determination. Most Cited Cases
Court assured both adequate notice of allegations against defendants and ample opportunity for meaningful defense to Government's motion for **detention** of defendants on ground defendants were likely to pose danger to safety of other persons or community if released, where court imposed burden of going forward at hearing on Government and accorded each defendant and his counsel as much time as they found necessary to deal with Government's charges. 18 U.S.C.A. §§ **3142**(b, c), 3143(a).

[6] Bail 49 ⚿49(3.1)

49 Bail
49II In Criminal Prosecutions
49k49 Proceedings to Admit to Bail
49k49(3) Evidence
49k49(3.1) k. In General. Most Cited Cases
(Formerly 49k49(3))
Rules of evidence do not limit conduct of bail hearings, even those resulting in **detention**; thus, hearsay may be considered, with judge applying his or her experience as fact finder to decide extent to which it is to be credited or discredited because of insufficient reliability.

[7] Constitutional Law 92 ⚿4653

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)5 Evidence and Witnesses
92k4653 k. **Presumptions**, Inferences, and Burden of Proof. Most Cited Cases
(Formerly 92k266(7))
Burden of proof allocations in criminal cases do not necessarily implicate due process requirements. U.S.C.A. Const.Amend. 5.

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[8] Constitutional Law 92 ⚿3797

92 Constitutional Law
92XXVI Equal Protection
92XXVI(F) Criminal Law
92k3797 k. Bail. Most Cited Cases
(Formerly 92k250.2(1))

Bail 49 ⚿42

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k42 k. In General. Most Cited Cases
(Formerly 92k250.2(1))
Where occasion for court's present determination was not offense leading to conviction but postconviction threat to safety posed by defendants, and class defined by Congress as all convicted defendants who represented such societal threat bore most direct imaginable nexus to remedy of **detention** pending sentencing, Bail Reform Act's failure to distinguish between those who pled guilty and those convicted after trial, between those convicted of misdemeanors and those convicted of felonies, and between those convicted of nonviolent and those convicted of violent offenses raised no equal protection problems. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 3143.

[9] Bail 49 ⚿39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases
Court may structure conditions of presentence **detention** so as to preserve rights of defendant to appeal and to present meaningful defense; thus, statute which provides for **detention** of defendant who is convicted but not yet sentenced unless he establishes by clear and convincing evidence he is not likely to pose danger to society or others does not implicate defendant's Sixth Amendment right to counsel. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. §§ **3142**(b, c), 3143(a).

[10] Constitutional Law 92 ⚿2790

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2790 k. Punishment in General. Most Cited Cases
(Formerly 92k203)
Absent "punishment," there is no ex post facto problem. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[11] Constitutional Law 92 ⚿2810

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(B) Particular Issues and Applications
92k2809 Criminal Proceedings
92k2810 k. In General. Most Cited Cases
(Formerly 92k199)

Bail 49 ⚿42

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k42 k. In General. Most Cited Cases
(Formerly 92k199)
Section of Bail Reform Act providing for **detention** of presentence convicted defendant unless defendant shows by clear and convincing evidence he is not likely to pose danger to society or others if released on bail is aimed not at punishing past con-

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duct but at protecting society generally, and its individual members particularly, from reasonably predictable future conduct; thus, where jury had already found beyond reasonable doubt that defendants had committed crimes, application of statute to them did not constitute impermissible ex post facto law. U.S.C.A. Const. Art. 1, § 9, cl. 3; 18 U.S.C.A. § 3143.

***1031** Judith Dobkin, John Scully, Sp. Attys., U.S. Dept. of Justice, Chicago, Ill., for plaintiff.
Elliot Samuels, [redacted] P. Lynch, Chicago, Ill., Joseph M. Laraia, Wheaton, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.
On January 9, 1985 each of Joseph DiVarco ("DiVarco") and Ronald Ignoffo ("Ignoffo") was convicted by a jury on all counts in which he was named in the indictment in this case. On January 10 the government moved for the **detention** of each of them pursuant to the Bail Reform Act of 1984 (the "Act"), 18 U.S.C. § 3143(a) ("Section 3143(a)"),[FN1] claiming each of them (though not any of their four convicted codefendants) was likely to pose a danger to the safety of other persons or the community if released pursuant to Sections **3142**(b) or (c).

FN1. All other citations to Title 18 (as amended by the Act) will also simply take the form "Section-." Citations to the Act's internal numbering will take the form "Act §-."

***1032** This Court immediately conducted a **detention** hearing (the "Hearing") on January 10 and 11. At the conclusion of the Hearing as to Ignoffo, this Court found he had not shown by clear and convincing evidence that he was not likely to pose such a danger. Accordingly Ignoffo was ordered detained in accordance with Section 3143(a).[FN2] DiVarco's hearing was not concluded because his doctors recommended he be hospitalized.[FN3] However, given the testimony to this point (implicating DiVarco not only in the gangland-type assassination tied to Ignoffo, see Ex. 1 Finding 1, but also to the botched assassination of Ken Eto, a witness in the trial of this case), this Court ordered DiVarco committed to the custody of the Attorney General for confinement at Bethany Methodist Hospital pending imposition of sentence (subject, of course, to a possibly different resolution if the Hearing were completed before that time).[FN4]

FN2. Exhibit 1 to this memorandum opinion and order is this Court's order of **detention** as to Ignoffo.

FN3. At that time DiVarco's doctors considered him an imminent pneumonia risk, in addition to his having an irregular heartbeat pattern and other problems. After his hospitalization they recommended installation of a pacemaker, which has since been done. DiVarco is now recuperating from that operation and should be capable of discharge from the hospital shortly, though a later hearing on that subject has disclosed further complications in his physical condition.

FN4. Exhibit 2 to this memorandum opinion and order is this Court's order of **detention** as to DiVarco.

Both DiVarco and Ignoffo have now moved for release from **detention**, launching a number of constitutional attacks on

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Section 3143(a). For the reasons stated in this memorandum opinion and order, their motions are denied.

Changed Standards Under the Act

Two of this Court's colleagues have recently dealt with the constitutionality of other bail provisions of the Act: Judge Hart in *United States* [redacted] *Hazzard,* 598 F.Supp. 1442 (N.D.Ill.1984) (pretrial **detention**) and Judge Getzendanner in *United States* [redacted] *Cirrincione,* 600 F.Supp. 1436, (N.D.Ill. 1985) (**detention** after sentencing and pending appeal, based on the likelihood of reversal on appeal). Though the constitutional considerations in those situations are obviously related to the considerations applicable to the present question, the distinctions among the several situations make neither of the earlier analyses controlling here.

Here we deal with already-convicted but not-yet-sentenced defendants, as to each of whom the decision of **detention** or release is based on whether he "is not likely to ... pose a danger to the safety of any other person or the community if released" (Section 3143(a)). Just such a likelihood of danger was an established basis for denying bail under *former* law, 18 U.S.C. § 3148 (repealed by Act § 203(a)):

A person ... who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the provisions of section 3146 [establishing conditions of release] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist ... the person may be ordered detained.

Pre-Act law also imposed the burden of establishing the absence of such danger on the convicted defendant-at least one who has already been sentenced. Although early case law under 18 U.S.C. § 3148 had treated its language as continuing to create the historial **presumption** [redacted] *against***detention** ***1033** (*United States* [redacted] *Provenzano,* 605 F.2d 85, 94 (3d Cir.1979)), in 1972 Fed.R.App. ("Rule") 9(c) was adopted expressly (1972 Advisory Committee Notes to that Rule):

to allocate to the defendant the burden of establishing that he will not flee and that he poses no danger to any other person or to the community. The burden is placed upon the defendant in the view that the fact of his conviction justifies retention in custody in situations where doubt exists as to whether he can be safely released pending disposition of his appeal.

See discussion in *Provenzano,* 605 F.2d at 93-95.

Thus the allocation of proof as to the dangerous *post* -sentence defendant is clear. But this Court has not located any case, either under prior law or under the Act, dealing with the burden-of-proof question in the post-conviction *pre* -sentence situation such as DiVarco's or Ignoffo's. It would surely seem, however, that Congress might reasonably have viewed the single fact of conviction (as opposed to the precise timing of a **detention** decision-whether pre-sentence or post-sentence) as determinative, so as to equate the burden of proof in any post-conviction situation to that defined in Rule 9(c) (see the later discussion of this subject). In any event, the

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Act has now changed the burden on the convicted defendant (both pre-sentence and post-sentence) to one of "clear and convincing evidence." FN5

FN5. Thus the shift from old 18 U.S.C. § 3148 and Rule 9(c) to Section 3143(a) involves two changes:

1. from "the judge has reason to believe that no ... conditions of release will reasonably assure that the person will not ... pose a danger...." to "the judicial officer finds ... that the person is not likely to ... pose a danger...."; and

2. from "the burden of establishing ... rests with the defendant" to "the judicial officer finds by clear and convincing evidence...."

It is always difficult to convert the semantics of such differently stated standards into a quantified comparison. Here the "reason to believe" test in the first pairing might arguably be viewed as harder for a defendant to overcome than its "finds not likely" counterpart. Conversely "clear and convincing" is plainly a more difficult burden for the defendant than a mere preponderance. Thus (with factors that might be perceived as pointing in different directions) the overall effect of the changes is not as obvious as it might seem at first blush. For purposes of this opinion, however, it will be assumed a defendant is worse off under the Act than under the old law.

Constitutional Considerations FN6

FN6. All the **detention** provisions of the Act have been drawn from the corresponding provisions of the District of Columbia Code (Sections 23-1321 to 23-1327), where they have been in effect since enactment of the District of Columbia Court Reform and Criminal Procedure Act of 1970. Section 3143(a) is a counter-part of D.C.Code § 23-1325(b). In *United States* [redacted] *Edwards,* 430 A.2d 1321 (D.C.1981) (en banc) the District of Columbia Court of Appeals dealt with the constitutionality of various of those provisions in an extended opinion (with some dissents on different issues).

1. *Eighth Amendment*

At the outset it should be made clear the "right to bail" here-at least in terms of a literal constitutional right-is plainly a misnomer. What the Eighth Amendment says on the subject is simply this:

Excessive bail shall not be required.... In *Carlson* [redacted] *Landon,* 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952) the Supreme Court rejected (albeit in dictum) the notion that because excessive bail cannot be set, the outright denial of bail must a fortiori be foreclosed. Instead the Eighth Amendment was there taken to mean that *if* an individual is found entitled to bail at all, the right created by that determination cannot be subverted by an unreasonably high bail setting (*id.* at 545, 72 S.Ct. at 536):

The [Eighth Amendment's] bail clause was lifted with slight changes from the English Bill of Rights Act. In England ***1034** that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in

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those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept. The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country.

There is room for debate on that score in the pre-conviction context, fueled in part by a dictum in *Stack* [redacted] *Boyle,* 342 U.S. 1, 4, 72 S.Ct. 1, 3, 96 L.Ed. 1 (1951) (decided the same term as *Carlson*) (emphasis in original):

From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. See *Hudson* [redacted] *Parker,* 156 U.S. 277, 285 [15 S.Ct. 450, 453, 39 L.Ed. 424] (1895). Unless this right to bail before trial is preserved, the **presumption** of innocence, secured only after centuries of struggle, would lose its meaning.

For an extended discussion of the issues in this area, see *United States* [redacted] *Edwards,* 430 A.2d 1321, 1325-31 (D.C.1981) (en banc).

But even the *Stack* dictum addresses the *pre* -conviction, not *post* -conviction, defendant. As for the latter category of offender Justice Douglas, scarcely a foe of civil liberties, spoke to the issue in his capacity as Circuit Justice in *Carbo* [redacted] *United States,* 82 S.Ct. 662, 666, 7 L.Ed.2d 769 (1962):

If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail.

Accord, *Harris* [redacted] *United States,* 404 U.S. 1232, 1235-36, 92 S.Ct. 10, 13-14, 30 L.Ed.2d 25 (1971) (Douglas, J., Circuit Justice); and see *Russell* [redacted] *United States,* 402 F.2d 185, 187 (D.C.Cir.1968):
Appellants will remain in custody not because they lack the means to make bail, but for the reason that their release would present danger to the community.

But see *Sellers* [redacted] *United States,* 89 S.Ct. 36, 38, 21 L.Ed.2d 64 (1968) (Black, J., Circuit Justice) (questioning whether a defendant's dangerousness can ever justify denial of bail).

[1] This Court therefore rejects, as to convicted defendants DiVarco and Ignoffo, the unconstitutionality of Section 3143(a) on Eighth Amendment grounds.[FN7] If defendants are to find relief, it must be elsewhere in the Constitution.

> FN7. There are cases that express some doubt on this score; see, e.g., *Hunt* [redacted] *Roth,* 648 F.2d 1148, 1158-62 (8th Cir.1981). But they do so on the theory that a wholly arbitrary denial of bail is the functional equivalent of "excessive bail," thus violating the Eighth Amendment. Even on that view, Congress' decision that a defendant's danger to society should foreclose his release can hardly be viewed as establishing a wholly arbitrary classification. Thus the conclusion reached in the text would not be altered by a different perception of the Eighth Amendment.

2. *Due Process Clause*

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Both DiVarco and Ignoffo advance a potpourri of challenges to the procedure under the Act. None is persuasive, and none calls for more than brief discussion.[FN8]

> FN8. True enough, just last year the Supreme Court said in *Schall* [redacted] *Martin,* 467 U.S. 253, 104 S.Ct. 2403, 2410, 81 L.Ed.2d 207 (1984):
>
> > In *Bell* [redacted] *Wolfish,* 441 U.S. [520], at 534 n. 15, 99 S.Ct. [1861], at 1871 n. 15 [60 L.Ed.2d 447 (1979)], we left open the question whether any governmental objective other than ensuring a detainee's presence at trial may constitutionally justify pretrial **detention**.
> >
> > But *Schall* itself upheld in due process terms (at least as to juveniles) a system of pretrial **detention** predicated on "the combined interest in protecting both the community and the juvenile himself from the consequences of future criminal conduct...." When the detained person has already been tried and found guilty of another crime (as have DiVarco and Ignoffo), the powerful consideration of the **presumption** of innocence (which undergirds all our concerns about pretrial **detention**, viewed as punishment, see *Stack,* 342 U.S. at 4, 72 S.Ct. at 3) loses its force. It would be a mistake to carry over to the present situation, in undiluted form, the troubled judicial soul-searching about pretrial **detention**-a soul-searching that has expressed itself in a continuing due process dialogue (contrast, for example, the majority and dissenting opinions in both *Schall* and *Bell*).

***1035** [2][3][4][5][6][7] Though they call on such pejorative rubrics as vagueness and lack of standards, DiVarco and Ignoffo attack Section 3143 in both procedural and substantive due process terms. It is true the statute does not specifically prescribe the procedures to be followed. But its requirement of a judicial officer's "find[ing] by clear and convincing evidence" necessarily connotes a hearing, and the clear implication of the statute is that the neighboring provisions of Sections **3142**(f) (dealing with hearings for presentence **detention**) and **3142**(g) (specifying the factors to be considered in such hearings, including safety or danger to other persons and the community) apply to Section 3143(a) as well.[FN9] This Court in fact conducted just such a hearing. In that light the DiVarco-Ignoffo arguments evanesce:

> FN9. Among other things, Section 3143(a) says a finding of no danger results in a release order under Section **3142**(b) or (c). Section **3142**(f) provides for the "**detention** hearing" to see which if any conditions under one of those very sections-Section **3142**(c)-should apply. Section **3142**(g) speaks of the factors to be considered at such a hearing. That statutory structure of course creates a common-sense link between the Section 3143(a) requirement of a finding, on the one hand, and the Section **3142**(f) hearing procedures and the Section **3142**(g) factors, on the other.

1. Any claim that it is not clear to whom the statute applies is absurd: It is *potentially* applicable to any convicted defendant, and it is *actually* applied against any such person about whom the government has information that he or she poses a po-

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tential danger to other persons or the community. That triggers the need for a judicial determination of the issue, and hence a hearing.

2. By its very nature, such "danger" can take a number of forms. Nothing requires Congress to substitute the particular for the generic-to give the term more precise content by giving examples or by establishing a laundry list. Certainly DiVarco and Ignoffo, tied by testimony to gangland-type assassinations (and with their potential for retaliation against witnesses here), cannot claim the concept of danger to others or the community is devoid of content in their cases. That would follow a fortiori from such cases as *Provenzano,* 605 F.2d at 95-96. And as to what constitutes a "sufficient showing" of the likelihood of such danger, that is no different from any other factual determination courts are regularly called upon to make.

3. By imposing the burden of going forward at the Hearing on the government and by according to each defendant and his counsel as much time as they found necessary to deal with the government's charges, this Court assured both adequate notice of the allegations against the defendants and ample opportunity for a meaningful defense. *Edwards,* 430 A.2d at 1339-41.

4. Even in full-blown criminal trials, the Sixth Amendment's Confrontation Clause poses the only *constitutional* objection to hearsay evidence. And it has always been true of bail hearings, including those resulting in **detention**, that the rules of evidence do not limit the conduct ***1036** of the hearing. Hearsay may be considered, with the judge applying his or her experience as a factfinder to decide the extent to which it is to be credited or discredited because of insufficient reliability. In fact the catchall provision of Fed.R.Evid. 803(24) and 804(b)(5) (which some thoughtful academicians and courts have suggested ought to supplant entirely the particularized exceptions to the hearsay rule) permit essentially that result even in the more formal environment of a trial. On this issue generally, see *Edwards,* 430 A.2d at 1337-38.

5. Burden of proof allocations do not necessarily implicate due process requirements. This opinion has already pointed out that prior law imposed on the defendant the burden of proof (at least in the post-conviction, post-sentencing situation) of negating his or her likely danger to other persons or the community where that was placed in issue. And so long as the issue is one of likelihood of danger, it appears rational for Congress to have equated the convicted felon *before* sentencing with the same convicted felon *after* sentencing for the purpose of protecting society against the dangers he or she presents. In turn, that equal need for protection carries with it the rationality of the congressional decision that the burden of proof in the two situations should be exactly the same. Once that determination is made, the use of a "clear and convincing" rather than a preponderance test does not appear to cross the borderline into a due process no-man's land.[FN10]

FN10. Candor compels the disclosure that this Court has found no case law (nor have the parties cited any) on this subject.

3. *Equal Protection Clause*

Ignoffo suggests Section 3143's failure to distinguish between those who plead guilty and those convicted after trial, between those convicted of misdemeanors and those

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convicted of felonies, and between those convicted of nonviolent and those convicted of violent offenses raises equal protection problems. DiVarco puts related issues in a different way: Section 3143's **presumption** against *all* convicted defendants-regardless of their offenses or backgrounds-bears no rational relationship to legitimate governmental interests of protecting the community (including other persons).

[8] Of course the distinctions between offenders made by Ignoffo cut against rather than for him, except the comparison based on the nonviolent nature of the offenses of which he has been convicted. That fact-that he is on the wrong side of two of the three comparisons-creates standing questions as to his ability to raise such other claims. But even apart from that, what both Ignoffo and DiVarco gloss over is that the *occasion* for this Court's present determination is not the offense leading to the conviction but the post-conviction threat to safety posed by the defendant.[FN11] *That* is the class Congress has defined-all convicted defendants who represent such a societal threat-and *that* class bears the most direct imaginable nexus to the remedy: **detention** pending sentencing. There can be no quarrel with the rationality of that classification for Equal Protection Clause purposes.[FN12]

FN11. This distinction is touched on more fully in the ex post facto discussion later in this opinion.

FN12. That rational distinction also demolishes DiVarco's suggestion of discriminatory enforcement based on the government's having sought **detention** of DiVarco and Ignoffo but not of their four codefendants (as to whom the government said it had no information indicating danger to other persons or to the community).

4. *Effective Assistance of Counsel*

[9] DiVarco says **detention** pending sentencing effectively negates his right to appeal, and both DiVarco and Ignoffo assert ***1037** Section 3143's alleged procedural flaws preclude any meaningful defense. Both those arguments are essentially Sixth Amendment right-to-counsel claims, and simply to state them is to disclose their total lack of merit. It is clearly possible for a court to structure the conditions of presentence **detention** so as to preserve those rights to a defendant.

5. *Ex Post Facto Clause*

Up to this point DiVarco and Ignoffo have struck out on all the grounds they assert. That leaves for consideration only the ex post facto question-a question that (given Judge Getzendanner's opinion invalidating a related provision of the Act on that score) bears careful scrutiny.

Because this Court is not called upon to decide the same issues as Judge Getzendanner or Judge Hart, and because orderly jurisprudence dictates the non-decision of constitutional questions until they must be resolved in the crucible of a live controversy (see *Ashwander* [redacted] *TVA,* 297 U.S. 288, 346-47, 56 S.Ct. 466, 482-83, 80 L.Ed. 688 (1936) (Brandeis, J., concurring)), nothing in this opinion should be construed as either subscribing to or disavowing either *Cirrincione* or *Hazzard.* But as both the extended analysis in *Cirrincione* and the shorter treatment in *Hazzard* reflect, the key to ex post facto vulnerability vel non in this case is whether, in the words of the most recent Supreme Court

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pronouncement on the clause, *Weaver* [redacted] *Graham,* 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981), a defendant's *punishment* has been increased by the new law:

The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.[FN13]

> FN13. Other facets of Ex Post Facto Clause coverage, such as its prohibition of (1) retrospective changes in conduct giving rise to criminal penalties and (2) the elimination of defenses available when the crime was committed, are plainly not in issue here.

It is true *Weaver, id.* at 29, 101 S.Ct. at 964 also speaks in terms of the challenged law "disadvantag[ing] the offender affected by it." But that characterization alone is oversimplistic, for the Supreme Court itself has consistently taught not every "disadvantage" is vulnerable under the Clause, and the core inquiry remains the **retroactive** increase in *punishment.* As *DeVeau* [redacted] *Braisted,* 363 U.S. 144, 160, 80 S.Ct. 1146, 1155, 4 L.Ed.2d 1109 (1960) put it:

The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation....

Just last Term the Supreme Court held pretrial **detention** to protect society from the potential consequences of predictable criminal acts was *not* punishment. *Schall* [redacted] *Martin,* 104 S.Ct. at 2412-13 (1984).[FN14] ***1038** Though that decision was rendered in the context of juveniles (with their special rights and disabilities), the same punishment [redacted] non-punishment analysis was announced as to adult pretrial detainees five years earlier in *Bell* [redacted] *Wolfish,* 441 U.S. 520, 535, 537, 538, 99 S.Ct. 1861, 1871, 1873, 1874, 60 L.Ed.2d 447 (1979) (citations omitted):

> FN14. *Schall* and a number of the other cases discussed in the text discuss the concept of "punishment" for due process (rather than ex post facto) purposes. Because there seems no logical reason the "punishment" concept should be given any different content in construing the two constitutional provisions, this Court has felt free to draw on the due process cases in this Ex Post Facto Clause discussion.

In evaluating the constitutionality of conditions or restrictions of pretrial **detention** that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in ac-

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cordance with due process of law.

Not every disability imposed during pretrial **detention** amounts to "punishment" in the constitutional sense, however. Once the Government has exercised its conceded authority to **detain** a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this **detention**. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to **detain**. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such **detention** interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of **detention** into "punishment."

This Court has recognized a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may.

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose.... Absent a showing of an expressed intent to punish on the part of **detention** facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."

What is at work under Section 3143 is not punishment for *past* conduct but the protection of society generally, and its individual members particularly, from reasonably predictable *future* conduct. *Schall,* 104 S.Ct. at 2417-18 (citations omitted) said:

Our cases indicate, however, that from a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the district court, "that it is impossible to predict future behavior ***1039** and that the question is so vague as to be meaningless."

That calls into play the concept our Court of Appeals applied to the Ex Post Facto Clause (albeit in a different context from the present one) in *United States* [redacted] *Sutton,* 521 F.2d 1385, 1390-91 (7th Cir.1975) (quoting *United States* [redacted] *Karnes,* 437 F.2d 284, 289-90 (9th Cir.), *cert. denied,*402 U.S. 1008, 91 S.Ct. 2189, 29 L.Ed.2d 430 (1971)):
It is well established "that where Congress has rationally concluded that persons who have demonstrated a tendency in the past to engage in conduct that Congress has the power to proscribe, Congress may restrict such future activities without violating the Ex Post Facto prohibition."

[10][11] Again the result here is foreordained by the like conclusions as to pretrial **detention**. In the pretrial situation the mere probable cause to believe commission of a crime, coupled with a perceived threat of the defendant to the safety of others, has rendered the **detention** order something

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other than "punishment." Absent punishment there is no ex post facto problem. Here, by comparison, a jury has already found beyond a reasonable doubt that DiVarco and Ignoffo have committed crimes. Surely society cannot be *less* entitled to protect itself and its members against what this Court has found the likelihood of real dangers-dangers that would be posed by the continued enlargement of convicted defendants Ignoffo and DiVarco [FN15] pending their sentencing.

FN15. This does not of course imply an ultimate finding as to DiVarco. Because the statute places the burden on him, and because the evidence during the Hearing to this point demonstrates a real probability of his posing a danger to the safety of others, his release pending completion of the Hearing would be improper.

Conclusion

Section 3143 is not vulnerable to constitutional onslaught, either on its face or as applied to DiVarco and Ignoffo.[FN16] Both their motions for release on bail pending sentencing are denied.

FN16. After this opinion was completed (and indeed signed and ready for issuance), this Court learned of the very recent decisions by three Courts of Appeal reaching a result opposite to that of Judge Getzendanner's *Cirrincione* opinion in the post-appeal situation covered by Section 3143(b). *United States* [redacted], 753 F.2d 19, (3d Cir. 1985); *United States* [redacted] *Powell* and other consolidated cases (8th Cir.) (order issued; opinion to follow); *United States* [redacted] *Affleck,* No. 84-2630 (10th Cir.) (same). In addition, on January 26 our own Court of Appeals entered an unpublished order (non-citeable and non-precedential under Circuit Rule 35) affirming Judge Kanne's decision rejecting ex post facto attack in *United States* [redacted] *Molte,* HCR 83-36-33 (N.D.Ind. Jan. 9, 1985). In accordance with the *Ashwander* principles referred to earlier in the text, this Court of course continues to express no opinion on the substantive issue posed by those cases. It has however obtained a copy of the one available opinion-*M*[redacted]-to determine how if at all that opinion may be useful here. As to that:

1. *Miller,* at 21 gives very short shrift to the ex post facto issue, simply declaring the "availability *vel non* of bail pending appeal, albeit extremely important to the individual involved, is a procedural issue rather than a type of punishment to which the Ex Post Facto Clauses apply."

2. None of the other constitutional issues raised by DiVarco or Ignoffo here was discussed in [redacted].

Suffice it to say that (not surprisingly, given the Court of Appeals' ruling) nothing in [redacted] points to a different result in this case. Nor does it appear any more likely that any of the other cases cited in this footnote would do so.

Exhibit 1

***1040** Exhibit 2

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(Cite as: 602 F.Supp. 1029)

UNITED STATES OF AMERICA,
Plaintiff,

[redacted]

JOSEPH DiVARCO, et al., Defendants.

NO. 84 CR 507

DETENTION ORDER

On January 9, 1985 following a jury trial, Joseph DiVarco ("DiVarco") was convicted on all counts in the indictment in which he was named in this case. On January 10 the government moved for DiVarco's **detention** pursuant to 18 U.S.C. § 3143(a). This Court immediately commenced a **detention** hearing (see 18 U.S.C. § [**3142**] (f)), found that the government had presented credible evidence that established prima facie (though this Court has not at this time definitively found) that DiVarco was likely to pose a danger to the safety of other persons or the community if released pursuant to 18 U.S.C. §§ **3142**(b) or (c) and that DiVarco had not yet established by clear and convincing evidence that he was not likely to pose such danger, and therefore ordered DiVarco detained pending completion of the hearing. Such completion of the hearing was not feasible at that time, in part because DiVarco's counsel advised that DiVarco's doctors had directed his hospitalization to avoid the possibility of his contracting pneumonia.

In accordance with 18 U.S.C. § 3143(a) this Court hereby orders that DiVarco be committed to the custody of the Attorney General for confinement at Bethany Methodist Hospital pending imposition of sentence, upon the following conditions:

1. DiVarco shall be allowed monitored visits from his immediate family (his wife, their children and their children's spouses). All such visits are to be prearranged through the United States Marshal's Service.

2. DiVarco's attorneys ([redacted] Lynch, Joseph Laraia and Jacqueline Walther) and his doctors shall have unlimited, unmonitored access to him.

3. United States Probation Officer Rhoda Michaels shall have unmonitored access to DiVarco by prearranged appointment.

4. DiVarco shall be provided telephone access to his immediate family (see Paragraph 1) if such access can be secured through the United States Marshal's Service. Such access shall not include a direct dial telephone.

5. No access shall be provided the United States Marshal's Service to DiVarco's medical records, nor shall any Marshal discuss DiVarco's medical condition with hospital personnel.

/s/ Milton I. Shadur

Milton I. Shadur

United States District Judge

Date: January 11, 1985

D.C.Ill.,1985.
U.S. [redacted]. DiVarco
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H
U.S. [redacted]. Rourke
D.C.Va.,1985.

United States District Court,E.D. [redacted],
Nortfolk Division..
UNITED STATES of America, Plaintiff,
v.
John ROURKE, et al., Defendants.
Crim. No. 84-94-N.

June 21, 1985.

On defendant's motion for bail pending appeal, the District Court, Doumar, J., held that: (1) defendant was not entitled to bail pending appeal; (2) Bail Reform Act of 1984 is not an ex post facto law; and (3) no manifest injustice resulted in ordering defendant to begin serving his sentence pending appeal.

Motion denied.

West Headnotes

[1] Bail 49 ⇐44(1)

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k44 Pending Appeal or Other Proceeding for Review
49k44(1) k. In General; Conditions. Most Cited Cases
Absent showing by clear and convincing evidence that defendant was not likely to flee, defendant was not entitled to bail pending appeal. 18 U.S.C.A. § 3143(b).

[2] Bail 49 ⇐39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases

Constitutional Law 92 ⇐2810

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(B) Particular Issues and Applications
92k2809 Criminal Proceedings
92k2810 k. In General. Most Cited Cases
(Formerly 92k199)
Bail Reform Act of 1984 [18 U.S.C.A. § 3143] is not an ex post facto law. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[3] Bail 49 ⇐44(1)

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k44 Pending Appeal or Other Proceeding for Review
49k44(1) k. In General; Conditions. Most Cited Cases
No manifest injustice resulted in ordering defendant, who had been admitted to bail before effective date of Bail Reform Act of 1984 [18 U.S.C.A. § 3143], to begin serving his sentence pending appeal, under rationale that even under Bail Reform Act of 1966 release on bail was modifiable and never a vested right, or under interpretation that 1984 Act was prospective law effectuating procedural change which fully applied to defendant upon his resentencing.

***860** Tommy E. [redacted], Robert E. Bradenham, II, Office of the U.S. Atty., E.D. Va., Walter E. Hoffman, U.S. Courthouse, Norfolk, Va., for plaintiff.
Paul D. Brunton, Tulsa, Okl., Lloyd J. Parker, Jr., Portsmouth, Va., for defendant John Rourke.

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MEMORANDUM ORDER

DOUMAR, District Judge.
On March 14, 1985, the defendant, John Rourke, was convicted of 21 U.S.C. § 963 (conspiracy to import cocaine) and 21 U.S.C. § 952(a) (importation of about 691 pounds of cocaine). Following the jury verdict of guilty and an evidentiary hearing, the Court ordered that Rourke, an accomplished pilot and the aviation consultant to a drug ring, be detained pending sentencing under 18 U.S.C. § 3143(a) of the Bail ***861** Reform Act of 1984. The Court now declines to modify that judgment for the reasons which follow.

Following the preparation of a pre-sentence report, the Court sentenced Rourke on May 3, 1985 to concurrent imprisonment terms of fourteen (14) years on both counts. Rourke now moves for bail pending appeal under 18 U.S.C. § 3143(b) as he remains incarcerated under the sentence imposed on May 3, 1985. Rourke argues that (1) the Bail Reform Act of 1984 is an *ex post facto* law as applied to him and (2) that the statute does not apply **retroactively** to a defendant like Rourke admitted to bail prior to the Act's passage.

I.

Laying aside constitutional analysis and questions of **retroactivity**, the relevant subsections of the Bail Reform Act of 1984 read as follows:

§ 3143. Release or **detention** of a defendant pending sentence or appeal.

(a) RELEASE OR **DETENTION** PENDING SENTENCE.-The judicial officer shall order that a person who has been found guilty of an offense and who is waiting imposition or execution of sentence, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any person or the community if released pursuant to section **3142**(b) or (c). If the judicial officer makes such a finding, he shall order the release of the person in accordance with the provisions of section **3142**(b) or (c).

(b) RELEASE OR **DETENTION** PENDING APPEAL BY THE DEFENDANT.-The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds-

(1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section **3142**(b) or (c); and

(2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

If the judicial officer makes such findings, he shall order the release of the person in accordance with the provisions of section **3142**(b) or (c).

18 U.S.C. § 3143. This new Act created significant revisions in standards and procedures governing bail. *See United States v. Williams,* 753 F.2d 329, 332 (4th Cir.1985).

Upon Rourke's conviction on March 14, 1985, the Court ruled that Rourke would be detained under Section 3143 Subsection (a), the section relevant to defendants pending sentencing. The evidence adduced

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at trial and at a post-verdict evidentiary hearing led the Court to find that clear and convincing evidence of Mr. Rourke's return for sentencing was wholly lacking. Actually, much evidence to the contrary was revealed. Rourke himself is a pilot who has maneuvered planes in and out of the United States at will and his family continues to own an aviation business. He was in poor financial condition. Rourke testified that he had received communications and threats of an undisclosed nature, from other fugitive co-defendants involved in the smuggling venture. These continuing communications particularly troubled the Court.

On April 17, 1985, the Fourth Circuit ruled that Rourke's appeal of his post-verdict but pre-sentence **detention** was "premature since the appellant has not yet been sentenced." *United States of America [redacted] John Rourke,* No. 85-5101 (4th Cir. April 17, 1985).

Following his sentencing on May 3, 1985, Rourke renewed his motion in this Court for bail pending appeal to allow his release from **detention** at least until the Fourth Circuit acted. The motion is now brought under 18 U.S.C. § 3143(b) (Release or **Detention** Pending Appeal), whereas prior to ***862** sentencing the relevant subsection was 3143(a) (Release or **Detention** Pending Sentencing).

Subsection (a) requires the Court to **detain** the defendant unless clear and convincing evidence shows that the defendant will not flee or pose a danger to safety of any other person or the community. The Court found such evidence lacking on March 14, 1985.

Subsection (b), relevant after sentencing, places a greater burden upon the *convicted and sentenced* defendant. The defendant is detained unless the Court finds that both § 3143(b)(1) *and* (b)(2) are met. Clearly, if the burden of proof of *either* subsection is not met, the defendant is detained.

[1] There have been numerous recent circuit courts of appeal decisions interpreting the appeal clause in § 3143(b)(2). *See e.g., United States [redacted] Molt,* 758 [redacted] F.2d 1198 (7th Cir.1985); *United States [redacted] Crabtree,* 754 F.2d 1200 (5th Cir.1985) (one judge); *United States [redacted] Handy,* 761 F.2d 1279 (9th Cir.1985); *United States [redacted] Giancola,* 754 F.2d 898 (11th Cir.1985); and *United States [redacted]* 753 F.2d 19 (3rd Cir.1985). Although these decisions interpret this subsection in a new and important way, these cases are irrelevant to the instant determination. Here, the Court stands pat on its findings at the post-conviction, presentence hearing that there was no showing by clear and convincing evidence that the defendant was not likely to flee. The operative language of subsection 3143(a) is identical to the language of subsection 3143(b)(1) regarding risk of flight. Hence, the Court need not further evaluate subsection 3143(b)(2) as Rourke desires, because he must meet the burdens of both subsections, not just one or the other.

II.

[2] Rourke claims that the Bail Reform Act of 1984 is an *ex post facto* law under Article I, sec. 9 of the Constitution. Until October 12, 1984, the relevant statutory rules regarding bail pending appeal were as follows:

A person ... who has been convicted of an offense and is either awaiting sentence or sentence review under section 3576 of this title [18 USCS § 3576] or has filed an appeal or a petition for a writ of certiorari, shall be treated in accordance with the pro-

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visions of section 3146 [18 USCS § 3146] unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay, the person may be ordered detained....

18 U.S.C. § 3148 (repealed). As the Seventh Circuit stated recently in *United States [redacted] Molt,* 758 F.2d 1198 (1985) (Posner, J.): "[T]he change in the standard for bail pending appeal is not an *ex post facto* law. 'Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto* '," *citing Dobbert [redacted] Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977); *see e.g., United States ex rel Massarella [redacted] Elrod,* 682 F.2d 688, 689 (7th Cir.1982) (extending the statute of limitations); *Dunn v. Maggio,* 712 F.2d 998, 1001-02 (5th Cir.1983) (per curiam) (repealing pardon statute). It appears that the recent circuit decisions construing the Bail Reform Act of 1984 are in accord with the view, *see, e.g. United States [redacted] Crabtree,* 754 F.2d 1200, 1201-02 (5th Cir.1985) (one judge); *United States [redacted]* 753 F.2d 19, 21 (3rd Cir.1985). The Court follows these cases and rejects the *ex post facto* claim.

III.

Rourke also claims that the Bail Reform Act of 1984 is a prospective law, inapplicable to those admitted to bail prior to its effective date on October 12, 1984.

The Supreme Court has ruled that federal courts must apply the law in effect at the time it renders a decision, unless such a decision would result in manifest injustice or where legislative history or statutory *868 direction is to the contrary. *Bradley [redacted] Richmond School Board,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *See National Posters, Inc. [redacted] N.L.R.B.,* 720 F.2d 1358, 1363 (4th Cir.1983). The Court here addresses the Congressional intent and the issue of "manifest injustice".

Rourke was admitted to bail in the amount of Twenty-Five Thousand Dollars ($25,000.00) in the Northern District of Oklahoma on July 30, 1984. The Bail Reform Act of 1966 was then in effect. He was free on bail at the effective date of the Bail Reform Act of 1984, yet the government made no attempt to seek his **detention** under the new statute's standards. However, *after* the jury returned a guilty verdict at his third trial, the government moved for his immediate **detention**. Under the new Act, 18 U.S.C. § 3143(b), the Court ordered Rourke's **detention** for the many reasons revealed in the transcript of the post-verdict **detention** hearing held on March 14, 1985.

This Court reads 18 U.S.C. § 3143(b) as speaking in terms of *conviction* as the triggering event, i.e., "a person ... found guilty ... and sentenced to a term of imprisonment ... who has filed an appeal ... [is] detained, unless...." Rourke's conviction occurred on March 14, 1985 and his sentencing was on May 3, 1985. Upon sentencing, the Court must review the defendant's status under the criteria of 3143(b). A defendant's conviction and a finding of guilty by a jury is a markedly different status from **presumed** innocence and release on bail prior thereto. *The statute recognizes the different status.*

The defendant in *United States [redacted] Zannino,* 761 F.2d 52 (1st Cir.1985), was admitted

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to bail before the Act's effective date. However, after its effective date, and before trial, the government moved for his **detention** under the "dangerous" defendant provisions of the new Act. *See*18 U.S.C. § 3143(a). The district Court affirmed the U.S. Magistrate, *who refused to revoke bail* under the Bail Reform Act of 1984, and the First Circuit reversed.

[3] The First Circuit in *Zannino* noted that even under the prior Bail Reform Act of 1966, bail terms were "subject to review when changed circumstances require that the release be reappraised." *Zannino, supra,* at 55. The Court cited 18 U.S.C. § 3146(e), *repealed by*18 U.S.C. § **3142**(c), which reads in part:

A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release.

Id. Although Rourke is a sentenced and convicted defendant unlike Zannino, who was a pre-trial defendant, Rourke was equally subject to the repealed subsection above by virtue of repealed § 3148, which states that those "awaiting ... sentence review ... shall be treated in accordance with the provisions of section 3146 unless [there exists] a risk of flight or danger is believed to exist, or if it appears that an appeal is frivolous or taken for delay...." The *Zannino* court went on to state:
Thus the release on bail allowed under the 1966 Act was not an absolute grant; defendants were given notice that a change in conditions or terms could bring about the revocation of the release. That statute, furthermore, created no expectation that conditions would not change.

What has actually occurred with the passage of the pretrial ***detention*** *provision may be considered a statutorily mandated change in those conditions....* We hold that defendants released under the 1966 Bail Act must show their continued eligibility for bail by meeting the newly imposed conditions if this issue is affirmatively raised by the Government.

Zannino, supra, at 55-56. It is plain that even under the prior Bail Reform Act of 1966 release on bail was modifiable and never a vested right; hence, Rourke would not profit from its applicability.

***864** Under the rationale of *Zannino,* or under an interpretation that the Bail Reform Act of 1984 is a prospective law effectuating a procedural change which fully applied to Rourke upon his sentencing, the Court holds that no manifest injustice results in ordering Rourke to begin serving his sentence pending appeal. There is no indication of any kind in the legislative history of the Bail Reform Act of 1984 that Congress intended it to apply to certain classes of defendants and not to others, nor of the Act's **retroactivity** or prospectivity. Furthermore, since the Act had an obvious impact on pretrial detainees and post-conviction defendants, any limitation on its applicability would have been expressed by Congress. *See generally Zannino, supra,* at 56-57.

The Court recognizes that in *United States* [redacted] *Mitchell,* 600 F.Supp. 164 (N.D.Cal.1985) Judge Patel held that the Bail Reform Act of 1984 was inapplicable to defendants admitted to bail under the prior, repealed Bail Reform Act of 1966. This Court is unable to discover any other reported decision to date following *Mitchell.* Indeed, in *United States* [redacted] *Allen,* 605 F.Supp. 864 (W.D.Pa.1985), Judge Diamond rejected an "ex post facto law"

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challenge and a "**retroactivity**" attack on the Bail Reform Act of 1984, by pre-trial detainees alleged to have committed crimes prior to the Act's passage. In another case, the First Circuit Court of Appeals rejected the "**retroactivity**" argument with respect to one charged before the new Act was effective and who sought pre-trial release. *See United States [redacted] Angiulo,* 755 F.2d 969, 973-74 (1st Cir.1985).

The Court therefore holds that the Bail Reform Act of 1984 is not an *ex post facto* law as applied to Rourke; that the Act is intended to apply to pending criminal matters such as the instant case and that a conviction by a jury is a substantial change in status of the defendant. Rourke shall remain incarcerated pending appeal.

IT IS SO ORDERED.

D.C.Va.,1985.
U.S. [redacted]. Rourke
611 F.Supp. 860

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sarial role has long been well established. We agree with the district court that petitioner's present claim is merely a variation of law that was well established at the time of the 1983 proceedings. The ends of justice can provide no exception in this case to the application of the abuse of the writ doctrine. The trial attorney could not prevent Ritter from testifying. Ritter's testimony—which admitted all of the relevant facts, evidenced no remorse, affirmatively sought the death penalty, and threatened harm to the jurors should they fail to return a death sentence—would have undermined any defense which the attorney might have presented. Under these circumstances, we are confident that the "ends of justice" concept does not warrant an exception to the abuse doctrine.

III. *Conclusion*

Although we GRANT the petition to proceed *in forma pauperis*, since both claims raised by petitioner are barred by the abuse of the writ doctrine, and since this issue would not be debatable among jurists of reason, we conclude the petitioner's application for a certificate of probable cause should be DENIED.

Accordingly, petitioner's emergency motion for a stay of execution is DENIED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jorge Enrique GAVIRIA and Jose Elkin Echeverry, Defendants-Appellants.

No. 87-5517.

United States Court of Appeals, Eleventh Circuit.

Sept. 3, 1987.

Narcotics defendants appealed magistrate's order of pretrial detention. The United States District Court for the Southern District of Florida, No. 87-303-CR-LCN, Lenore Carrero Nesbitt, J., affirmed, and defendants took further appeal. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) Government could proceed at pretrial detention hearing by way of proffer of evidence; (2) defendants' right to call adverse witnesses was conditional; and (3) defendants were not entitled to de novo hearing before district court.

Affirmed.

1. Criminal Law ⇐1158(1)

Court of Appeals applies plenary standard of review in considering appeals under Bail Reform Act, but purely factual findings of district court remain subject to clearly erroneous review standard. 18 U.S.C.A. § 3141 et seq.

2. Bail ⇐49(3)

At pretrial detention hearing, Government as well as defense may proceed by proffering evidence, subject to discretion of judicial officer presiding at detention hearing. 18 U.S.C.A. § 1341 et seq.

3. Bail ⇐42, 49(5)

Defendant in pretrial detention hearing has only conditional right to call adverse witnesses; judicial officer presiding at detention hearing is vested with discretion whether to allow defense counsel to call adverse witness with or without initial proffer of expected benefit of witness' testimony. 18 U.S.C.A. § 1341 et seq.

4. Bail ⇐49(5)

Narcotics defendants were not entitled to de novo hearing to fully review magistrate's pretrial detention order which was based on proffers of evidence, where order was affirmed after reviewing Government's and defendants' memoranda of law and transcript of proceedings before magistrate. 18 U.S.C.A. § 1342(e).

Milton Hirsch, Miami, Fla., for Gaviria.

Samuel J. Rabin, Jr., Miami, Fla., for Echeverry.

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Leon B. Kellner, U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, FAY and HATCHETT, Circuit Judges.

HATCHETT, Circuit Judge:

Jorge Enrique Gaviria and Jose Elkin Echeverry appeal the decision of the district court imposing pretrial detention pursuant to 18 U.S.C. § 3142(e). We affirm.[1]

FACTS

On April 30, 1987, Jorge Enrique Gaviria and Jose Elkin Echeverry were arrested and charged with several Title 21 narcotics offenses. The government requested temporary detention of Gaviria and Echeverry pursuant to 18 U.S.C. § 3142(d) after determining that they were in the United States illegally.

On May 6, 1987, a United States Magistrate conducted a pretrial detention hearing pursuant to 18 U.S.C. § 3142(f) and ordered pretrial detention of Gaviria and Echeverry.[2] The magistrate based the pretrial detention order on risk of flight and dangers posed to the community as authorized by 18 U.S.C. § 3142(e). Gaviria and Echeverry requested a review of the magistrate's order and a *de novo* hearing before the district court, alleging that (1) the magistrate erroneously permitted the government to proceed by proffering evidence at the pretrial detention hearing; (2) defense counsel were not permitted to call as a witness the government's case agent, who was present at the detention hearing; and (3) Gaviria and Echeverry were interviewed by immigration agents while in custody without notice to their defense counsel.

The district court, without a *de novo* hearing, affirmed the magistrate's order of pretrial detention noting that the government had met its burden under the Bail Reform Act.

Gaviria and Echeverry urge this court to reverse the district court's order affirming their pretrial detention. They allege that (1) the magistrate erred in allowing the government to proceed by proffer; (2) defense counsel were erroneously prevented from calling the government's case agent as a witness; and (3) the district court erred in failing to conduct a *de novo* review of the pretrial detention proceedings.[3]

DISCUSSION

[1] We note that this circuit has adopted the plenary standard of review in considering appeals under the Bail Reform Act. *United States v. Hurtado*, 779 F.2d 1467, 1470–73 (11th Cir.1985). Nevertheless, the purely factual findings of the district court remain subject to the clearly erroneous standard. *Hurtado*, 779 F.2d at 1472.

1. This matter came to the court as a "Motion for Bail Pending Trial." We noted that 18 U.S.C. § 3145 provides for an appeal from a pretrial detention order. Under our rules and operating procedures, a single judge may determine a motion for bail pending appeal, but a panel must determine an appeal pursuant to 18 U.S.C. § 3145.

2. Title 18 U.S.C. § 3142(f) provides, in pertinent part, that:

> The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of the person as required and the safety of any other person and the community....
>
> ....
>
> At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.
>
> ....
>
> The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person

3. Gaviria and Echeverry have not raised before this court their contention that various statements made to agents of the U.S. Border Patrol were improperly introduced at the detention hearing.

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I.

Gaviria and Echeverry contend that the magistrate committed error by allowing the government to proceed by proffer at the pretrial detention hearing and by improperly precluding defense counsel from calling as a witness the government's case agent who was present at the detention hearing. The district court, citing a decision of the Third Circuit, *United States v. Delker*, 757 F.2d 1390 (3d Cir.1985), stated that "the magistrate did not err in allowing the government to proceed by proffer during the pretrial detention hearing. Nor did the magistrate err in the defendants' request to call the case agent as a witness on their clients' behalf under section 3142(g)(2) of the Bail Reform Act." We agree.

Although this circuit has not expressly addressed the issue of whether the government at a pretrial detention hearing may proceed solely by proffer, the court in *Delker* stated that

> the 'procedural requirements for the pretrial detention hearing set forth in section 3142(f) are based on those of the District of Columbia statute which were held to meet constitutional due process requirements in *United States v. Edwards*,' 430 A.2d 1321 (D.C.App.1981) (en banc), *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 141 (1982). S.Rep. No. 225, 98th Cong. at 1st Sess. at 22 (1983), *reprinted in* 1984 U.S. Code Cong. & Adm.News at 25 (Supp. 9A).

Delker, 757 F.2d at 1395. In *Edwards*, the District of Columbia Court of Appeals held that "the information presented to the judicial officer by *either the government or the defense* may be by proffer...." *Edwards*, 430 A.2d at 1334. In *Edwards*, the court continued by stating that

> The legislative history of the statute confirms Congress' intent that the information upon which the judicial officer makes his findings need not be sworn testimony, and that the hearing is not designed to afford defendants a discovery device. Thus, in providing that the finding of substantial probability is to be based upon information presented 'by proffer or otherwise,' the House report anticipates 'that, as is the present practice under the Bail Reform Act, ... the use of sworn testimony will be the exception and not the rule....' [B]ail hearings under the Bail Reform Act, which frequently result in detention of the accused, proceed primarily by way of proffers. They are not formal trials requiring strict adherence to technical rules of evidence. *If the court is dissatisfied with the nature of the proffer, it can always, within its discretion, insist on direct testimony.* But discretion should be left to the court without imposing on it the burden of limiting admissibility to that it would permit a jury to hear.

Edwards, 430 A.2d at 1334 (citation omitted) (original emphasis). Additionally, the United States Supreme Court recently held, in *United States v. Salerno and Cafaro*, — U.S. —, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), that under the Bail Reform Act of 1984, "Congress hoped to 'give the courts adequate authority to make release decisions that give appropriate recognition to the danger a person may pose to others if released.'" *Salerno*, 107 S.Ct. at 2098 (citing S.Rep. No. 98–225 at 3).

[2] In light of the legislative history and the relevant case law relating to the Bail Reform Act of 1984, we reject Gaviria's and Echeverry's contention that the magistrate erred in allowing the government to proceed at the pretrial detention hearing by way of proffer. We hold that the government as well as the defense may proceed by proffering evidence subject to the discretion of the judicial officer presiding at the detention hearing.

[3] Gaviria and Echeverry also allege error because the magistrate refused defense counsels' request to call the government case agent, who was present at the hearing, as a witness. We note that 18 U.S.C. § 3142(f) specifically provides that a defendant may testify, present witnesses, and cross-examine witnesses who appear at the detention hearing. The court in *Edwards* held, however, that:

> The legislative history does not discuss the scope of cross-examination permitted

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> of witnesses who are called by the government. Section 1322(c)(4) gives the accused the right 'to present witnesses in his own behalf,' but the House report states that the accused has only a *conditional* right to call *adverse* witnesses:
>
> He may not, of course, call witnesses who ordinarily would be expected to testify for the government at trial, *unless he can proffer to the court in reasonable detail how he expects their testimony to negate substantial probability.*

Edwards, 430 A.2d at 1334 (original emphasis). We agree that the defendant in a pretrial detention hearing has only a conditional right to call adverse witnesses. We, however, do not adopt the procedural guideline under *Edwards* requiring the defendant to initially proffer to the court in detail how an adverse witness's testimony is expected to negate substantial probability as a prerequisite to calling such witness. The legislative history compels a finding that the judicial officer presiding at the detention hearing is vested with the discretion whether to allow defense counsel to call an adverse witness with or without an initial proffer of the expected benefit of the witness's testimony. Moreover, as the court in *Edwards* noted, "[t]he related trial right of compulsory process, as provided by the sixth amendment, guarantees that *the defendant may compel* the attendance of witnesses in his favor." *Edwards*, 430 A.2d at 1338 (emphasis added).

II.

[4] Gaviria and Echeverry next contend that the district court erred in failing to conduct a *de novo* hearing to fully review the magistrate's detention order which was based merely on proffers of evidence. The district court's order, however, expressly states that it affirmed the magistrate's order after reviewing "the Government's and Defendants' Memorandum of Law and the transcript of the proceedings before the Magistrate, in accordance with *U.S. v. Hurtado*, 779 F.2d 1467 (11th Cir.1985)." In *Hurtado*, we held that *de novo* review requires the court to exercise independent consideration of all facts properly before it and to include written findings of fact and a written statement of the reasons for the detention. *Hurtado*, 779 F.2d at 1480–81. We find that the district court's order in this case complies with the requirements under *Hurtado*, and we affirm the district court's denial of Gaviria's and Echeverry's request for a *de novo* hearing because the district court properly afforded *de novo* review of the magistrate's detention order.

III.

Gaviria and Echeverry also contend that the pretrial detention statute was unconstitutionally applied in this case. This claim is not persuasive. For the above-stated reasons, we hold that the application of section 3142 at the pretrial detention hearing in this case was wholly constitutional and procedurally correct.

Accordingly, we affirm the decision of the district court.

AFFIRMED

David W. TROEDEL, Petitioner-Appellee, Cross-Appellant,

v.

Richard DUGGER, Secretary, Florida Department of Corrections, Respondent-Appellant, Cross-Appellee.

No. 86-5860.

United States Court of Appeals, Eleventh Circuit.

Sept. 4, 1987.

Richard E. Doran, Asst. Atty. Gen., Dept. of Legal Affairs, Miami, Fla., Peggy A. Quince, Dept. of Legal Affairs, Tampa, Fla., for respondent-appellant, cross-appellee.

Capital Collateral Representative, Mark Evan Olive, Tallahassee, Fla., Steven H. Malone, Sp. Appointed Asst. Representa-

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C
U.S. v. Angiulo
C.A.Mass.,1985.

United States Court of Appeals,First Circuit.
UNITED STATES of America, Appellee,
v.
Gennaro J. ANGIULO, Defendant, Appellant.
No. 84-1745.

Heard Jan. 10, 1985.
Decided Feb. 25, 1985.

An accused sought release from pretrial **detention**. The United States District Court for the District of Massachusetts, David S. Nelson, J., applying the Bail Reform Act of 1984, ordered that accused remain in custody. Accused appealed on ground that the Bail Reform Act did not apply to one like him whom Government had charged before Act took effect. The Court of Appeals, Breyer, Circuit Judge, held that standards of the Bail Reform Act were applicable to one who was incarcerated and seeking release when Act became law.

Affirmed.

West Headnotes

[1] Bail 49 ⇐39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases
Standards of the Bail Reform Act were applicable to one who was incarcerated and seeking release when Act became law. 18 U.S.C.A. § 3141 et seq.

[2] Bail 49 ⇐49(3.1)

49 Bail
49II In Criminal Prosecutions
49k49 Proceedings to Admit to Bail
49k49(3) Evidence
49k49(3.1) k. In General. Most Cited Cases
(Formerly 49k49(3))
District court could rely on evidence obtained by electronic surveillance, legality of which accused challenged, in considering whether to grant bail under Bail Reform Act. 18 U.S.C.A. § 3141 et seq.

[3] Bail 49 ⇐49(3.1)

49 Bail
49II In Criminal Prosecutions
49k49 Proceedings to Admit to Bail
49k49(3) Evidence
49k49(3.1) k. In General. Most Cited Cases
(Formerly 49k49(3))
Materials under seal offered legally sufficient basis for district court to conclude under the Bail Reform Act that no condition or combination of conditions imposed on release of accused would reasonably assure safety of any other person and the community. 18 U.S.C.A. §§ 3141 et seq., **3142**(e).

***969** James L. Sultan, Boston, Mass., with whom Joseph T. Travaline, Burlington, Mass., was on brief, for defendant, appellant.
Diane M. Kottmyer, Boston, Mass., with whom Ernest S. Dinisco, Jane E. Serene, Sp. Attys., William F. Weld, U.S. Atty. and Jeremiah T. O'Sullivan, Sp. Atty., Boston, Mass., were on brief, for appellee.

Before BREYER, ALDRICH and TORRUELLA, Circuit Judges.

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BREYER, Circuit Judge.

The district court, applying the Bail Reform Act of 1984, found that the release of Gennaro Anguilo from pretrial **detention** would put at risk the "safety" of the community, and it ordered that he remain in custody. Anguilo appeals, on the ground that the new Bail Reform Act does not apply to one like him whom the government had charged *before* the new Act took effect. Since we do not agree with this claim, since Anguilo makes no significant constitutional challenge to the new statute on this appeal, and since we find that the district court's order has sufficient evidentiary support, we affirm the district court's decision.

I

The basic procedural facts are the following. On September 19, 1983, a grand jury charged appellant with several serious federal crimes. On September 20, the government brought appellant before a magistrate, who ordered him held without bail lest he flee the jurisdiction-a decision that the district court affirmed. In early January, 1984, this court upheld the lawfulness of appellant's pretrial confinement, finding the evidence of risk of flight sufficient to make this a "rare case of extreme and unusual circumstances that justifies pretrial **detention** without bail." *United States v. Anguilo,* No. 83-1965 (1st Cir. Jan. 5, 1984), quoting *United States v. Abrahams,* 575 F.2d 3, 8 (1st Cir.), *cert. *970 denied,*439 U.S. 821, 99 S.Ct. 85, 58 L.Ed.2d 112 (1978).

During 1984 appellant first asked the magistrate and then twice asked the district court to reconsider his circumstances. *See* Bail Reform Act of 1966, 18 U.S.C. former §§ 3146(d) and 3147(a). On October 9, 1984, the district court wrote that it was "prepared to order" that appellant be released under conditions "tantamount to house arrest"; and, it asked the government to suggest appropriate safeguards. In response, the government noted that the new Bail Reform Act had just become law (on October 12, 1984); it asked the court to continue appellant's **detention** under the new Act's "dangerousness" provisions. On October 19, the court ordered appellant's continued **detention**. Subsequently, in a memorandum of October 23, the court wrote that its

> stated intention in its prior decision to release the defendant on bail is withdrawn, and the government's motion that the defendant be detained pending trial as required by the Bail Reform Act of 1984 is allowed.

Anguilo appeals from the district court's decision.

II

[1] The basic legal issue in this case is whether the standards of the new Bail Reform Act, 18 U.S.C. § 3141*et seq.,* apply to one who, like appellant, was incarcerated (and seeking release) on October 12, 1984, when the new Act became law. The Act itself does not say. It speaks of an "effective date" of "October 12, 1984," but it is silent as to whether, or to what extent, it applies to those charged before that date. Its language neither precludes nor mandates such application. Similarly, the parties have not been able to point to anything in the legislative history of the Act that suggests Congress explicitly considered the question. We have found, however, two sources of authority that point towards a proper legal answer.

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First, courts often turn to various "canons" of construction to interpret statutes that are silent or ambiguous. *See generally, e.g.,* C. Sands, *Statutes and Statutory Construction* (4th ed. 1984); R. Dickerson, *The Interpretation and Application of Statutes* (1975). One such canon, relevant here, interprets new statutes and other new law to reflect an intent to apply to cases in the process of being decided at the time the new law takes effect. This canon, or principle, is reflected in Chief Justice Marshall's well known statement that,

> if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed....

United States v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102, 109, 2 L.Ed. 49 (1801). This principle is embodied in the Supreme Court's holding that a new law applies to a case in progress unless applying it "would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974); *New England Power Co.* v. *United States,* 693 F.2d 239, 244 (1st Cir.1982). The case before us is one that was pending on October 12. The district court had not reached a final decision about appellant's application for release. Since nothing in the new Bail Reform Act or its legislative history says that the Act does *not* apply, *Bradley* requires us to look to the "justice" or "injustice" of the new Act's application.

We do not believe it "unjust" to apply the new Act to those, like appellant, who were in custody on October 12, 1984, because those then in custody are unlikely to have relied to their detriment upon the continued application of prior law. In this respect there is an important difference between persons in custody on October 12 and those free on bail. The latter might claim that they have relied upon continued freedom in making plans for their trial defense, or in making other important plans; and the threat of incarceration might disrupt those plans. The former, however, could not have reasonably relied ***971** upon the freedom promised them under prior law, for they were committed to custody under that law. At best theirs was a *hope* for freedom that changing circumstances might, or might not, have let them realize.

Without a showing of likely significant and justified reliance those in custody fall outside both *Bradley* 's exception and the scope of other canons that disfavor "**retroactive**" application of new statutes. *See, e.g., United States* v. *Security Industrial Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982); *Greene* v. *United States,* 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964); *United States* v. *Heth,* 7 U.S. (3 Cranch) 399, 413, 2 L.Ed. 479 (1806). These canons basically seek to protect the interests of those who have reasonably relied upon the legal status quo. *See* 2 C. Sands, *Statutes and Statutory Construction* §§ 41.04, 41.05 (4th ed. 1973). An inability to find such likely reliance by those incarcerated indicates that application of the new law is not unjust, and that Congress therefore likely intended the new law to apply, at least to pending proceedings involving incarcerated persons.

Applying a canon like *Bradley* 's to discern congressional intent is not simply to indulge in a legal fiction. The *Bradley* rule (reflecting the *Schooner Peggy* principle) is well established. Legislative draftsmen and

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their legal advisors often refer to well established interpretive principles when preparing statutory language. A court decision consistent with such a principle is more likely than its opposite to reflect what congressional staffs, advisors, witnesses, interest groups, and legislators themselves believe will occur despite a legislative history that is silent. (In fact, silence may reflect an absence of controversy, not congressional indifference to the result.) At the same time consistent judicial adherence to interpretive principles eases the task of drafting legislation by pointing to likely future interpretive results without requiring statutory language on every point. These practical institutional considerations as well as legal theory recommend adherence to *Bradley* 's interpretive rule here.

Second, a consideration of the new Act's basic purposes suggests that legislators, with those purposes in mind, would likely favor the Act's application to those in custody. *Cf. Mayburg v. Secretary of Health and Human Services,* 740 F.2d 100, 104-07 (1st Cir.1984). The Act has at least two objectives. On the one hand, it seeks to prevent the "arbitrary use of high money bail as a way to assure a defendant's incarceration." S.Rep. No. 225, 98th Cong., 1st Sess. 9-10 (1983) U.S.Code Cong. & Admin.News 1984 pp. 1, 11, 12 ("It has been suggested that pretrial **detention** under" the former Bail Act "is often the result of intentional imposition of excessively stringent release conditions, and in particular high money bonds"). *See* Hearings before the Subcommittee on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 100, 181, 216-17 (1982). It therefore states explicitly what the prior statute said implicitly, that a "judicial officer may not impose a financial condition that results in the pretrial **detention** of any person." 18 U.S.C. § **3142**(c). (*See* Appendix, *infra,* for text of relevant portions of the Act.) On the other hand, the new Act broadens the courts' authority to **detain** "dangerous" persons prior to trial. It requires magistrates and judges to focus on the question of danger directly, and allows them, after a hearing, to keep in custody not only defendants who pose a serious risk of flight, but also those who seriously threaten the "safety" of others or of "the community." 18 U.S.C. § **3142**(e). Thus the statute seeks to assure release of the defendant who is "safe but poor" while allowing **detention** of a dangerous defendant financially capable of posting a bond.

Given these purposes, it is difficult to see why Congress would not want the new law to apply to those incarcerated at the time it was enacted. To apply the new Act's specific language to the "safe but poor" defendant furthers Congress's statutory objective, benefits the defendant, and deprives the government of nothing to which it was entitled under the old law, *cf.* former ***972** 18 U.S.C. § 3146(a), or the new. To apply it (in what must be an unusual situation) to a "dangerous" person previously held as a "flight risk" also furthers Congress's statutory objectives by keeping those persons in custody. Although application of the new statute works to the disadvantage of any such defendant who otherwise would be released, nothing in the new Act or its history suggests congressional solicitude for this category of defendant. Indeed, the only possible offsetting consideration to repeated congressional declarations that such defendants should be kept in custody, *see* S.Rep., *supra,* at 10-12, would be some special consideration of "fairness." But, as we have already said, we can find nothing unfair about applying the new Act to one already in custody and

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to a judicial proceeding already in progress.

In sum, principles of statutory construction resting upon fairness and consideration of the statute's purposes both suggest that Congress intended the statute to apply in cases like the one before us.

We next consider four arguments to the contrary. First, Anguilo points to § **3142**(f) of the new Act. That section says that the magistrate or judge will decide whether to **detain** or to release a defendant after a "**detention** hearing" which

> shall be held immediately upon the person's first appearance before the judicial officer unless that person or the attorney for the government seeks a continuance [for a maximum of five days and two days respectively].

Anguilo points out that this **detention** hearing could not have been held "immediately" in the case of a person first detained before the provision became law (October 12, 1984). He concludes from this fact that the new law was not meant to apply to such a person.

This conclusion, however, rests too much upon too little. The object of § **3142**(f)'s quoted language is to guarantee a speedy bail determination, to prevent the magistrate or judge from ordering the defendant temporarily detained (*see*18 U.S.C. § **3142**(d)), and then holding the key "**detention**" hearing at some much later time. S.Rep., *supra,* at 21-22. The language does not say that if, for some special reason, one cannot hold the key hearing "immediately," the entire Act no longer applies. Nor does it forbid application of the Act's standards at other hearings, say those at which a magistrate reconsiders previously ordered incarceration.

We concede that the way in which § **3142**(c) is to be applied seems slightly confusing because of an odd procedural omission in the new Act. Congress apparently has not enacted an explicit procedural counterpart to § 3146(d) of the former 1966 Act, which provided for magistrate or district court reconsideration of a **detention** order. As far as we can tell, § **3142**(f) of the new Act governs the magistrate's (or judge's) *initial* decision whether to **detain** or to release a defendant on conditions. The last sentence of § **3142**(c) then allows the magistrate or judge "at any time" to "amend" a *release* order. But, the Act nowhere says how one *detained* can seek a new determination in light of changed circumstances. (Section 3145, at first blush, may seem to provide for such review; but in fact it does not, for it governs only what are in essence appeals, from magistrate to district court and from district court to court of appeals). After reviewing the legislative history, we have concluded that this procedural omission was inadvertent, for Congress nowhere expresses any intent to deny a person in custody the right to ask for reconsideration. In the absence of an express statutory reconsideration provision, the magistrate and district court nonetheless possess inherent power to reconsider previous **detention** orders-an inherent power to modify (or revoke) previous bail orders that the 1966 Act's statutory provisions "merely embodied." C. Wright, *Federal Practice and Procedure: Criminal 2d* § 769. *See Stack* [redacted] *Boyle,* 342 U.S. 1, 11, 72 S.Ct. 1, 6, 96 L.Ed. 1 (1951) (opinion of Jackson, J.); *Fernandez* [redacted] *United States,* 81 S.Ct. 642, 644, 5 L.Ed.2d 683 (1961) (opinion of Circuit Justice Harlan) ("District courts have authority as an incident***973** of their inherent powers ... to re-

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voke bail"); *United States v. Black,* 543 F.2d 35, 37 (7th Cir.1976) ("[T]he same statute which explicitly empowers the district court to impose conditions upon release pending appeal, implicitly empowers the court to make such adjustments in those conditions as circumstances may necessitate."). We conclude that the proceeding under review is properly characterized from a procedural perspective as such a reconsideration by the district court of its prior **detention** order. Regardless, this procedural problem does not help appellant, for the question remains what standards Congress intended a magistrate or court to apply at a reconsideration hearing. And for the reasons previously stated, we believe that Congress wanted (or would have wanted) the new Act's standards applied to one then being held in custody.

Second, the parties point to three recent cases deciding similar issues. The government notes that in *United States v. Payden,* 598 F.Supp. 1388 (S.D.N.Y.1984), the district court upheld application of the new law to a defendant arraigned before October 12. Appellant notes that in two other cases the courts denied application of the new Act to persons arraigned before its enacting. In the first of these, however, the Eleventh Circuit refused *per curiam* to apply the new law to persons whose "release was ordered by the district court before the new law became effective." *United States v. Fernandez-Toledo,* 749 F.2d 703 (11th Cir.1985) (per curiam). The court ruled the new statute inapplicable because, in its view, defendants' "right to bail had already vested." It treated the appellants as if they were persons free on bail before October 12. In doing so, it treated them as outside the rationale of this opinion. *See* pp. 970-971, *supra.* And, we therefore do not consider it as conflicting.

In *United States v. Mitchell,* 600 F.Supp. 164 (D.Cal.1985), a California district court held the new Act inapplicable in circumstances much like this one. The California court, however, based its decision upon the reliance interests of those *released* on bail before October 12. The court did not distinguish between the class of released persons and the class of persons in custody. It seems to us, however, that the fact of custody (and the consequent small likelihood of significant reliance) makes an important and meaningful difference. Moreover, the "in custody/at liberty" distinction is simple and easy to administer. *Cf. United States v. Mitchell, supra,* at 168-169. Thus, we believe we can best effectuate likely congressional intent by applying the new Act's standards to those detained at the time of its enactment.

Third, appellant claims that the district court is applying new law "**retroactively**," and he invokes a series of cases that, he says, forbid "**retroactivity**." *See United States v. Security Industrial Bank,* 459 U.S. 70, 79, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982); *Greene v. United States,* 376 U.S. 149, 160, 84 S.Ct. 615, 621, 11 L.Ed.2d 576 (1964); *United States v. Heth,* 7 U.S. (3 Cranch) 399, 413, 2 L.Ed. 479 (1806); *Addison v. Bulk Food Carriers, Inc.,* 489 F.2d 1041, 1042-43 (1st Cir.1974). "**Retroactivity**," however, is a relative, not an absolute, notion. The law before us is not **retroactive** in the sense of punishing or rewarding conduct previously carried out, *see, e.g., Weaver v. Graham,* 450 U.S. 24, 28, 101 S.Ct. 960, 963, 67 L.Ed.2d 17 (1981); *Calder v. Bull,* 3 U.S. (3 Dall.) 385, 390, 1 L.Ed. 648 (1978). On the other hand, it is **retroactive** in the sense that it applies to one already charged when the law was enacted. In these circumstances, the word "**retroactive**" does not itself an-

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swer the applicability question. Rather, one must look beneath the word to the functional considerations that it embodies. And, doing so, for reasons stated at pp. 970-971, leads us to conclude that the new Act applies here.

Fourth, appellant argues that his case ought to be considered like that of a person released, not a person in custody, for, he says, the district court had ordered him released before October 12. As a practical matter, however, appellant had not been released. As a formal matter, the court had made no final decision to release him. Rather, the new Act became law and was ***974** brought to the attention of the district court while it was in the midst of deciding what to do with appellant's motion for release. The court had not ordered appellant's release. On October 9, the court said it was "prepared" to do so; it later characterized its decision as "tentative"; and it spoke in its October 23 memorandum of its previous "intention." On January 9, 1985, the court characterized its decision as one made in response to an ongoing motion for modification. *United States* [redacted] *Zannino,* Cr. No. 83-235-N, slip op. at 5 n. 1 (D.Mass. Jan. 9, 1985). Moreover, a release order by the district court would have been appealable under § 3145, and therefore not "final" in this additional sense. Thus, both formal and practical considerations require us to treat this case as one involving the application of the new Bail Act's standards to one presently in custody. And for the reasons stated, the Act's new standards apply.

III

[2] Appellant argues that, even if the new Act applies, the government has not proved by the "clear and convincing" evidence that the Act requires that he poses a danger to "the safety of any other person and the community." 18 U.S.C. § **3142**(f). He first claims that the district court could not rely on the evidence obtained by electronic surveillance, the legality of which he challenges. We previously wrote, however, in *In re Globe Newspaper,* 729 F.2d 47, 54 (1st Cir.1984), a case in which both defendant and the government were parties, that the provisions of federal law "allow the disclosure of [information obtained through electronic surveillance] to the court conducting ... bail hearings," at least until a court has decided that the material was not obtained legally. Otherwise, the challenge of a defendant to lawfully obtained materials might prove sufficient to keep highly relevant information from the judicial officer or to delay the initial bail hearing, contrary to the "immediacy" requirement of § **3142**(f).

[3] Appellant also argues that the materials on which the district court relied (including those obtained from electronic surveillance) are stale or irrelevant or conclusory and, in any event, even when taken together are insufficient for the district court's conclusion. Those materials are under seal. We have examined them, and we conclude that they offer a legally sufficient basis for the district court to conclude that "no condition or combination of conditions [imposed on release] will reasonably assure ... the safety of any other person and the community." 18 U.S.C. § **3142**(e).

Finally, appellant argues that the district court held that he was as dangerous inside jail as outside; hence there is no rational basis for holding him. Given the fact that common sense strongly suggests that **detention** must have some effect on "danger," we do not believe the district court meant with absolute literalness that

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the risks appellant poses to others in the community are *precisely* the same whether or not he is detained. In any event, we are unwilling to assume it meant this in the absence of a showing in the record that the court focused directly on the issue that appellant's counsel now raises.

Again we note that appellant does not now challenge the basic constitutionality of the new Act's "dangerousness" provisions. On the basis of our resolution of the issues he has presented to us on this appeal, we believe the district court's decision is legally correct, and that decision is

Affirmed.

APPENDIX

18 U.S.C. §§ **3142** , 3145

"§ **3142** . **Release or detention** of a defendant pending trial

"(a) In General.-Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be-

"(1) released on his personal recognizance or upon execution of an unsecured ***975** appearance bond, pursuant to the provisions of subsection (b);

"(2) released on a condition or combination of conditions pursuant to the provisions of subsection (c);

"(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion pursuant to the provisions of subsection (d); or

"(4) detained pursuant to the provisions of subsection (e).

"(b) Release on Personal Recognizance or Unsecured Appearance Bond.-The judicial officer shall order the pretrial release of the person on his personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of his release, unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

"(c) Release on Conditions.-If the judicial officer determines that the release described in subsection (b) will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, he shall order the pretrial release of the person-

"(1) subject to the condition that the person not commit a Federal, State, or local crime during the period of release, and

"(2) subject to the least restrictive further condition, or combination of conditions, that he determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person-

"(A) remain in the custody of a designated person, who agrees to supervise him and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not

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pose a danger to the safety of any other person or the community;

"(B) maintain employment, or, if unemployed, actively seek employment;

"(C) maintain or commence an educational program;

"(D) abide by specified restrictions on his personal associations, place of abode, or travel;

"(E) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

"(F) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

"(G) comply with a specified curfew;

"(H) refrain from possessing a firearm, destructive device, or other dangerous weapon;

"(I) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

"(J) undergo available medical or psychiatric treatment including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

"(K) execute an agreement to forfeit upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court such indicia of ownership of the property or such percentage of the money as the judicial officer may specify;

"(L) execute a bail bond with solvent sureties in such amount as is reasonably necessary to assure the appearance of the person as required;

"(M) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

***976** "(N) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

The judicial officer may not impose a financial condition that results in the pretrial **detention** of the person. The judicial officer may at any time amend his order to impose additional or different conditions of release.

"(d) Temporary **Detention** To Permit Revocation of Conditional Release, Deportation, or Exclusion.-If the judicial officer determines that-

"(1) the person-

"(A) is, and was at the time the offense was committed, on-

"(i) release pending trial for a felony under Federal, State, or local law;

"(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

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"(iii) probation or parole for any offense under Federal, State, or local law; or

"(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

"(2) the person may flee or pose a danger to any other person or the community;

he shall order the **detention** of the person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take the person into custody during that period, the person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary **detention** is sought under paragraph (1)(B), the person has the burden of proving to the court that he is a citizen of the United States or is lawfully admitted for permanent residence.

"(e) **Detention**.-If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the **detention** of the person prior to trial. In a case described in (f)(1), a rebuttable **presumption** arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that-

"(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in section (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

"(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

"(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later.

Subject to rebuttal by the person, it shall be **presumed** that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq)., the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) title 18 of the United States Code.

***977** "(f) **Detention** Hearing.-The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) will reasonably assure the appearance of the person as required and the safety of any

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other person and the community in a case-

"(1) upon motion of the attorney for the Government, that involves-

"(A) a crime of violence;

"(B) an offense for which the maximum sentence is life imprisonment or death;

"(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or section 1 of the Act of September 15, 1980 (21 U.S.C. 955a); or

"(D) any felony committed after the person had been convicted of two or more prior offenses described in subparagraphs (A) through (C), or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) if a circumstance giving rise to Federal jurisdiction had existed; or

"(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, that involves-

"(A) a serious risk that the person will flee;

"(B) a serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed five days, and continance on motion of the attorney for the Government may not exceed three days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the Government or on his own motion, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether he is an addict. At the hearing, the person has the right to be represented by counsel, and, if he is financially unable to obtain adequate representation, to have counsel appointed for him. The person shall be afforded an opportunity to testify, to present witnesses on his own behalf, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing.

"(g) Factors To Be Considered.-The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning-

"(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves

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a narcotic drug;

"(2) the weight of the evidence against the person;

"(3) the history and characteristics of the person, including-

"(A) his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

***978** "(B) whether, at the time of the current offense or arrest, he was on probation, or parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

"(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(2)(K) or (c)(2)(L), the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

"(h) Contents of Release Order.-In a release order issued pursuant to the provisions of subsection (b) or (c), the judicial officer shall-

"(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

"(2) advise the person of-

"(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

"(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

"(C) the provisions of sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

"(i) Contents of **Detention** Order.-In a **detention** order issued pursuant to the provisions of subsection (e), the judicial officer shall-

"(1) include written findings of fact and a written statement of the reasons for the **detention**;

"(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

"(3) direct that the person be afforded reasonable opportunity for private consultation with his counsel; and

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"(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

"(j) **Presumption** of Innocence.-Nothing in this section shall be construed as modifying or limiting the **presumption** of innocence.

"§ **3145. Review and appeal of a release or detention** order

"(a) Review of a Release Order.-If a person is ordered released by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court-

"(1) the attorney for the Government may file with the court having original jurisdiction over the offense, a motion for revocation of the order or amendment of the conditions of release, and

"(2) the person may file, with the court having original jurisdiction over the offense,***979** a motion for amendment of the conditions of release.

The motion shall be determined promptly.

"(b) Review of a **Detention** Order.-If a person is ordered detained by a magistrate, or by a person other than a judge of a court having original jurisdiction over the offense and other than a Federal appellate court, the person may file, with the court having original jurisdiction over the offense, a motion for revocation or amendment of the order. The motion shall be determined promptly.

"(c) Appeal From a Release or **Detention** Order.-An appeal from a release or **detention** order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly."

C.A.Mass.,1985.
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755 F.2d 969

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H
U.S. v. Zannino
C.A.1 (Mass.),1985.

United States Court of Appeals,First Circuit.
UNITED STATES of America, Plaintiff, Appellant,
v.
Ilario M.A. ZANNINO, Defendant, Appellee.
No. 85-1070.

Argued March 8, 1985.
Decided May 3, 1985.

United States appealed from an order of the United States District Court for the District of Massachusetts, David S. Nelson, J., denying its motion to revoke bail of defendant and to **detain** him pursuant to the Bail Reform Act. The Court of Appeals, Torruella, Circuit Judge, held that provisions of Bail Reform Act on pretrial **detention** and bail revocation were applicable to a defendant released on bail before effective date of Act where defendant's expectation of remaining free on bail was both minimal, in view of emphatic statement of magistrate, upon both granting motion for bail under earlier law and denying Government's motion for revocation of bail, that he found defendant to be a danger to community and that he would **detain** defendant if he had a legal mechanism by which to do so, and outweighed by public interest in protection from demonstrably dangerous defendants.

Reversed.

Breyer, Circuit Judge, dissented and filed an opinion.

West Headnotes

Bail 49 ⚿39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases
Provisions of Bail Reform Act on pretrial **detention** and bail revocation were applicable to a defendant released on bail before effective date of Act where defendant's expectation of remaining free on bail was both minimal, in view of emphatic statement of magistrate, upon both granting motion for bail under earlier law and denying Government's motion for revocation of bail, that he found defendant to be a danger to community and that he would **detain** defendant if he had a legal mechanism by which to do so, and outweighed by public interest in protection from demonstrably dangerous defendants. 18 U.S.C.A. §§ **3142**(e), 3148(b).

***53** Diane M. Kottmyer, Boston, Mass., with whom Ernest S. Dinisco and Jane E. Serene, Sp. Attys., William F. Weld, U.S. Atty., and Jeremiah T. O'Sullivan, Sp. Atty., Boston, Mass., were on brief for plaintiff, appellant.
Joseph J. Balliro, Boston, Mass., with whom James L. Sultan, Boston, Mass., was on brief for defendant, appellee.

Before BREYER and TORRUELLA, Circuit Judges, and SELYA,[FN*] District Judge.

FN* Of the District of Rhode Island, sitting by designation.

TORRUELLA, Circuit Judge.
The matter is before us on appeal by the United States from a denial by the United States District Court for the District of

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Massachusetts of its motion to revoke the bail of defendant/appellee Ilario M.A. Zannino and to **detain** him, after hearing, pursuant to the Bail Reform Act of 1984, specifically 18 U.S.C. § **3142**(e) and 3148(b).FN1

FN1. Section 18 U.S.C. § **3142**(e) provides:

DETENTION.-If, after a hearing pursuant to the provisions of subsection (f), the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the **detention** of the person prior to trial. In a case described in (f)(1), a rebuttable **presumption** arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if the judge finds that-

"(1) the person has been convicted of a Federal offense that is described in subsection (f)(1), or of a State or local offense that would have been an offense described in subsection (f)(1) if a circumstance giving rise to Federal jurisdiction had existed;

"(2) the offense described in paragraph (1) was committed while the person was on release pending trial for a Federal, State, or local offense; and

"(3) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in paragraph (1), whichever is later. Subject to rebuttal by the person, it shall be **presumed** that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), section 1 of the Act of September 15, 1980 (21 U.S.C. 955a), or an offense under section 924(c) of title 18 of the United States Code."

Section 18 U.S.C. § 3148(b) provides:

(b) REVOCATION OF RELEASE.-The attorney for the Government may initiate a proceeding for revocation of an order of release by filing a motion with the district court. A judicial officer may issue a warrant for the arrest of a person charged with violating a condition of release, and the person shall be brought before a judicial officer in the district in which his arrest was ordered for a proceeding in accordance with this section. To the extent practicable, a person charged with violating the condition of his release that he not commit a Federal, State, or local crime during the period of release shall be brought

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before the judicial officer who ordered the release and whose order is alleged to have been violated. The judicial officer shall enter an order of revocation and **detention** if, after a hearing, the judicial officer-

"(1) finds that there is-

"(A) probable cause to believe that the person has committed a Federal, State, or local crime while on release; or

"(B) clear and convincing evidence that the person has violated any other condition of his release; and

"(2) finds that-

"(A) based on the factors set forth in section **3142**(g), there is no condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community; or

"(B) the person is unlikely to abide by any condition or combination of conditions of release.

If there is probable cause to believe that, while on release, the person committed a Federal, State, or local felony, a rebuttable **presumption** arises that no condition or combination of conditions will assure that the person will not pose a danger to the safety of any other person or the community. If the judicial officer finds that there are conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, he shall treat the person in accordance with the provisions of section **3142** and may amend the conditions of release accordingly."

***54** On September 19, 1983, a federal grand jury returned a twenty count indictment against Zannino and six others. The charges related to murders, gambling, and other illegal acts. When first brought before the magistrate on September 20, 1983, Zannino was ordered held without bail on the grounds that no conditions of pretrial release would reasonably assure his appearance at trial. Eventually, however, terms for release on bail were set. In his order dated December 23, 1983, the magistrate expressly found that Zannino posed a serious and substantial threat to the safety of the community and that, were it not for the fact that he had no authority to **detain** the defendant under the 1966 Bail Reform Act on those grounds, he would unhesitatingly order Zannino held without bail pending trial. Zannino was, therefore, released on bail in early January, 1984.

Shortly after the passage of the Bail Reform Act of 1984 in October of that year, the Government filed a motion to revoke bail as to Zannino and to hold a **detention** hearing, alleging, as grounds thereof, the previous findings of the magistrate concerning dangerousness to the community and the provision of the new 1984 Act which now provided for restrictive **detention** without bail under those circumstances. 18 U.S.C. § **3142**(e) (1984). Additionally, the Government submitted affidavits to support a finding of probable cause that the defendant had committed a felony while on pretrial release, which un-

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der the 1984 Act was grounds for revocation of bail. 18 U.S.C. § 3148(b) (1984). The magistrate denied the motion, finding that the 1984 Act did not apply to pending cases in which the defendant was already released on bail. In his order, however, he once again reiterated his conclusion that no condition or combination of conditions could reasonably assure the safety "of any other person" or the community in the absence of Zannino's pretrial **detention**. The magistrate's denial was thereafter affirmed by the district court and the government appealed. Thus, the specific issue before us is whether Sections **3142**(e), which provides for the pretrial **detention**, and 3148(b), which provides for bail revocation, apply to a defendant released on bail prior to the effective date of the 1984 enactments.[FN2]

FN2. Inasmuch as the constitutionality of a retrospective application of the 1984 Act is not now being challenged, the case must turn on the intent of Congress.

The Supreme Court has held that the federal courts must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice ***55** or where there is clear statutory direction or legislative history to the contrary. *Bradley* [redacted] *Richmond School Board,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). *See United States* [redacted] *Gennaro J. Angiulo,* 755 F.2d 969, 970 (1st Cir.1985) (Breyer, J.); *New England Power Co.* [redacted] *United States,* 693 F.2d 239, 244 (1st Cir.1982). Furthermore, and more to the point, it is clear that the conditions under which a defendant is originally released on bail are subject to review when changed circumstances require that the release be reappraised.

That the decision releasing Zannino was not unalterable and, even as originally issued, was subject to revision at any time prior to trial, is particularly evidenced by the text of the section of the pre-1984 Act under which he was released:

A judicial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release. *Provided* that, if imposition of such additional or different conditions results in the **detention** of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody, subsection (d) [requiring review] shall apply.

(Emphasis in original). Bail Reform Act of 1966, 18 U.S.C. § 3146(e), *repealed by* Bail Reform Act of 1984, 18 U.S.C. § **3142**(c). Thus the decision regarding the terms of bail may be considered to have been an open matter, subject to post-bail release review, even before the 1984 Act was passed on October 12th.

We thus look to the situation created by the passage of the 1984 Act, to ascertain whether an individual in Zannino's position should in effect receive a privilege vis-a-vis all defendants charged after October 12th, notwithstanding the pendency of all their proceedings. Since nothing in the new Act or its legislative history suggests that the new Act does *not* apply, *Bradley* requires that we look to the "justice" or "injustice" of the new Act's application. *United States* [redacted] *Angiulo, supra,* at 970.

In our opinion in *Angiulo,* for a point of comparison with the facts in that case, we stated that a defendant released on bail prior to enactment of the new Act might have

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a stronger argument to support his contention that the pretrial **detention** provisions did not apply to his case. *Id.* By positing this hypothetical, we were not creating a hard and fast rule. Closer examination, within the context of an actual case and controversy, does not support this exception to the **retroactivity** of the new Act. Section 3146(e) of the 1966 Act clearly states that conditions of the release can be changed, and that the inability to meet such conditions could require the return to custody. Thus the release on bail allowed under the 1966 Act was not an absolute grant; defendants were given notice that a change in conditions or terms could bring about the revocation of the release. That statute, furthermore, created no expectation that conditions would not change.

What has actually occurred with the passage of the pretrial **detention** provision may be considered a statutorily mandated change in those conditions. That is, under Section **3142**(e) of the 1984 Act, for a defendant to be eligible for pretrial bail, he must be able in certain instances to rebut the **presumption** that no condition or combination of conditions will reasonably assure the safety of "any other person and the community." 18 U.S.C. § **3142**(e). We hold that defendants released under the 1966 Bail Act must show their continued eligibility for bail by meeting the newly imposed conditions if this issue is affirmatively raised by the Government.

Moreover, in the case at bar, Zannino had further indication of possible revocation of bail in that the magistrate, upon both granting the motion for bail and denying the government's motion for revocation of bail, emphatically stated that he found the appellee to be a danger to the community and that, had a legal mechanism by which he could **detain** Zannino existed, he would have done so. This clearly constituted notice***56** to appellee that a change of condition, such as has occurred by the passage of the 1984 Act allowing pretrial **detention** for dangerousness, would call for reevaluation of his release.

Under the manifest injustice standard of *Bradley, supra,* the disappointment of private expectations that results from the implementation of a new rule must be balanced against public interest in the enforcement of that rule. *New England Power Co., supra,* 693 F.2d at 245; *Adams Nursing Home of Williamstown, Inc. v. Mathews,* 548 F.2d 1077, 1080 (1st Cir.1977). Important public policy considerations dictated the enactment of a pretrial **detention** mechanism whereby the community could be safeguarded from the "alarming problem" of crimes committed "by demonstrably dangerous defendants" while on pretrial release. *See* Report of the Committee on the Judiciary, United States Senate, on S.1762, S.Rep. No. 225, 98th Cong., 1st Sess. at 1, 5-7 (1984), U.S.Code Cong. & Admin.News 1984, pp. 3182, 3184, 3187-3189. Logic and common sense, as well as the new Act's legislative history, dictate application of the new conditions to *all* dangerous defendants, including those previously released because of the lack of judicial power to prevent such a result.

Congress could scarcely have been plainer in indicating the concerns which prompted passage of the 1984 Act. S.Rep. No. 225, for example, explicitly remarked the need to confer "authority to deny release to those defendants who pose an especially grave risk to the safety of the community." *Id.* at 5. Furthermore, "[i]n the Committee's view, it is intolerable that the law denies judges the tools to make honest and appro-

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priate decisions regarding the release of such defendants." This is strong talk, couched in a sense of legislative urgency. It is inconceivable to us that, in the face of such concerns, the Congress meant for the courts to temporize in the application of the pretrial release provisions of the 1984 Act by interdicting the use of such **detention** powers in *any* suitable case, whether or not the accused had previously been released under the more relaxed criteria of the 1966 Act. The legislative history, fairly read, represents a clear statutory directive favoring applicability of the new pretrial release scheme across the board. Indeed, the basic purposes of the new Act, as we delineated them in *Angiulo,* at 971-972, lead to the same conclusion.

The statistics cited by our dissenting brother are similarly unconvincing. The smallness of the potentially affected group is transmutable: it can be used just as powerfully to argue for, as against, the applicability of the 1984 Act. Neither this contention nor its corollary-ease in judicial administration-therefore cuts much ice. Even a single dangerous defendant left free to wreak havoc under circumstances where pretrial **detention** is constitutionally permissible and legally appropriate is one menace too many; and, if the price of protecting the public is more work for already overtaxed judges, it is a small price to pay for the wellbeing of the community.

Finding that, under the circumstances of this case, the defendant's expectation to remain free on bail is minimal, and is clearly outweighed by the public interest in protection from demonstrably dangerous defendants and that his professed reliance on limitless future liberty up to the date of his trial was, in these circumstances, unjustified, we conclude that under the *Bradley* and *New England Power Co.* standards, Sections **3142**(e) and 3148(b) apply **retroactively** to Zannino, and that the government is entitled to a hearing before the magistrate on the merits of the issues raised by its motion to revoke.

We recognize that other courts have reached a contrary conclusion, *e.g., United States* [redacted] *Fernández-Toledo,* 749 F.2d 703, 705 (11th Cir.1985), and we do not lightly create a split among the circuits. Yet, mindful of the nature of the rights involved, the impact of the change in law upon those rights, the will of the Congress, and the substantial public interest which we perceive to be at stake, we must respectfully disagree with the rationale of the Eleventh Circuit. The *Fernández-Toledo**57* panel, without in-depth analysis of either the provisions of the 1966 Act or the legislative history of the 1984 Act, held under circumstances comparable to those at bar that the defendant's "rights to bail had already vested,"*id.,* and therefore declined to give the new law retrospective effect in such a situation. We are not of a similar mind. To be "vested," a thing must be "fixed; ... settled; absolute ...; not contingent." H. Black, *Black's Law Dictionary* at 1401 (5th Ed.1979). The cession of bail partakes of none of these characteristics; it is a privilege extended, as even the 1966 Act evidenced, on a contingent, nonabsolute basis, entirely subject to the dynamics of change, consistent with applicable law and fundamental fairness.

For the reasons which we have noted above, we do not view Zannino's right to release on bail as having been "vested" in any meaningful sense of that term and we see no sufficient reason why he should be immune from the provisions of the 1984 Act in this regard.

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The decision of the district court is *reversed.*

BREYER, Circuit Judge (dissenting).
The issue in this case is whether the provision of the new Bail Act that provides for **detention** of "dangerous" persons, 18 U.S.C. § **3142**(f), applies to a person already released on bail the day the new Act was passed (October 12, 1984). This court has previously suggested (though it did not expressly hold) that Congress did not intend this provision of the Act to apply, in a sense "**retroactively**," to those persons. *United States* ▮ *Anguilo,* 755 F.2d 969, 970 (1st Cir.1985). I believe the suggestion is correct for the following reasons.

First, it is "manifestly unfair" to apply the new **detention** provision to those released on bail before the new law was passed. *See Bradley* ▮ *Richmond School Board,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Magistrates and judges specifically gave those defendants their provisional freedom. The defendants in all likelihood relied on the fact that (in the absence of misbehavior) they would remain free to prepare their trial defense, to interview witnesses, to consult with their attorneys. Trials, for most members of this class, must be imminent. Application of the new standard to members of this class threatens to interfere severely with ongoing defense preparations, not only because it may place a defendant behind bars just before trial, but also because even appearance at a bail revocation hearing, at this stage in the new Act's life, involves briefing and arguing a host of novel and difficult legal issues, threatening significantly to divert counsel's and client's attention and energies away from the trial on the merits nearly at hand. This burden, along with the likely surprise, adds up to a serious, adverse interference with a settled expectation. That means "unfairness." *See Myers* ▮ *Hawkins,* 362 So.2d 926, 933 n. 25 (Fla.1978) (" 'One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated.' ") (quoting 2 Sands, *Sutherland Statutory Construction* § 41.05 at 261 (4th ed. 1973)).

Second, not to apply the **detention** provision of the new Act to previously released defendants does not interfere significantly with Congress's objective: giving judges a way to deal with "dangerous" defendants. The number of persons already free on bail (as of October 12) is rapidly diminishing. The Director of the Administrative Office of the United States Courts reports that approximately 18,000 indictments or charges are pending at any one time. The average length of time between charge and trial is 4.4 months. Thus even if *all* federal defendants facing charges on October 12 were on release (with an average time of 2.2 months remaining before trial), by now (April 1985) there must be only a handful of pre-October 12 defendants whose trials have not yet begun. Can one say that, in terms of Congressional purpose, it is of critical importance to apply the new Act to this small (and diminishing) class of persons,***58** when Congress itself considered adoption of this "dangerous person" provision for almost twenty years? *See* S.Rep. No. 225, 98th Cong., 1st Sess. 7 & n. 19 (1983), *reprinted in* 1984 U.S.Code Cong. & Ad.News 3182, 3189 & n. 19 (Supp. 9A).

Third, the courts that have considered this question have held that the Act does not apply to this class of persons. *United States* ▮ *Fernandez-Toledo,* 749 F.2d 703, 705

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(11th Cir.1985) (per curiam) (holding that such persons have rights that have "vested" and that "it would be manifestly unjust" to apply the new Act to them); *United States* [redacted] *Mitchell,* 600 F.Supp. 164 (N.D.Cal.1985) ("Congress apparently did not contemplate that individuals released pursuant to [the old Act] would be subject to sanctions under [the new Act]."); *see United States* [redacted] *Payden,* 759 F.2d 202 (2d Cir.1985) (reversing district court decision ordering **detention**, under provisions of the new Bail Act, of defendant whose release had been ordered pursuant to provisions of the old Bail Act). Even were I less convinced of the correctness of *Anguilo,* I would hesitate to create a split in the circuits over this particular legal issue.

Fourth, there is additional support in the language of the new Bail Act itself. The new Act does not contain a provision that allows the government to recall a defendant solely for the purpose of applying the new, stricter standard of release. The new Act (like the old) does provide for reconsideration and modification of *release conditions, see*§ **3142**(c) (allowing imposition of "additional or different conditions of release"), but this provision does not authorize a "modification" that changes a release order into an unconditional **detention** order. The new Act also permits the government to seek bail *revocation, see*§ 3148, but only if the government can show that the defendant has violated his release conditions. Of course, there is substantial authority for the proposition that courts have an "inherent power" to revoke bail when necessary to insure the defendant's appearance or to protect the integrity of the *judicial* process. *See, e.g., Carbo* [redacted] *United States,* 82 S.Ct. 662, 667-69, 7 L.Ed.2d 769 (Douglas, Circuit Justice) (protection of witnesses) (1962); *Fernandez* [redacted] *United States,* 81 S.Ct. 642, 5 L.Ed.2d 683 (1961) (Harlan, Circuit Judge) (protection of witnesses and "orderly progress of the trial"); *United States* [redacted] *Abrahams,* 575 F.2d 3 (1st Cir.) (risk of flight), *cert. denied,*439 U.S. 821, 99 S.Ct. 85, 58 L.Ed.2d 112 (1978); *United States* [redacted] *Melville,* 306 F.Supp. 124, 127 (S.D.N.Y.1969) (same); *United States* [redacted] *Graewe,* 689 F.2d 54 (6th Cir.1982) (per curiam) (protection of witnesses and judicial process); *United States* [redacted] *Gilbert,* 425 F.2d 490 (D.C.Cir.1969) (per curiam) (protection of witnesses); *United States* [redacted] *Bentvena,* 288 F.2d 442 (2d Cir.1961) (integrity of judicial proceedings); *cf. United States* [redacted] *Anguilo, supra,* at 972. But there is no authority extending that "*inherent* " power to instances of defendant "dangerousness."

Finally, the legislative history of the new Act, as the majority effectively concedes, proves little. Its language demonstrates congressional concern *both* for preventing crimes and for treating accused persons fairly. *See, e.g.,* S.Rep., *supra,* at 22 (noting "the importance of the interests of the defendant which are implicated in a pretrial **detention** hearing" and the "due process" considerations in establishing the procedural requirements of the new Act).

The arguments advanced in favor of applying the new provision (in a sense) **retroactively** to those previously released are unconvincing. The government says that, if the new Act does not apply in its entirety to these defendants, then no law applies to them, for Congress repealed the old 1966 Bail Reform Act as of October 12, 1984. This argument is incorrect. When, for some reason or other, a new provision in a new law does not (or cannot) apply to a particular situation or person, courts typically hold that the former law survives and gov-

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erns that circumstance or person, whether or not the new law "expressly" repeals the old law as of a certain date. Thus, for example, Congress has repealed the Youth Corrections Act as of October 12, 1984, *see****59**Pub.L. No. 98-473, Title II, § 218(a)(8), 98 Stat. 1837, 2027 (1984), but, as the Department of Justice has recognized, it may be unconstitutional under the *ex post facto* clause to apply certain portions of Congress's substitute to certain defendants who committed crimes prior to that date. *See* U.S. Dept. of Justice, *Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress* 32 (1984). As to those persons, the Department says, the old (repealed) law will still apply. *Id. See also United States* [redacted] *Romero,* 596 F.Supp. 446 (D.N.M.1984). A similar approach in this case is in accord with well established legal precedent. *See, e.g., United States* [redacted] *Payden, supra* (holding that defendant's bail status should be determined under provisions of old Bail Act, even after its repeal, where bail application had first been considered under provisions of old Act); *United States Gypsum Co.* [redacted] *Uhlhorn,* 232 F.Supp. 994, 1004 (E.D.Ark.1964), *aff'd,*366 F.2d 211 (8th Cir.1966), *cert. denied,*385 U.S. 1026, 87 S.Ct. 753, 17 L.Ed.2d 674 (1967); *State* [redacted] *McMillin,* 150 Colo. 23, 370 P.2d 435 (1962) (en banc); *In re Opinion of the Justices,* 8[redacted] N.H. 563, 198 A. 249 (1938); *Waddell* [redacted] *Mamat,* 271 Wis. 176, 72 N.W.2d 763 (1955); *see generally*82 C.J.S. Statutes § 435 at 1010-11 (1953). Thus, to hold that Congress did not intend to apply the "dangerous person" provision **retroactively** does not create a legal vacuum.

The government also argues that it is not unfair to apply the new provision to this *particular* defendant because he did not *in fact* rely upon guarantees of continued freedom. It does not make sense here, however, to apply an "unfairness" test on a case-by-case basis. The very act of doing so creates unfair burdens, for it injects a new, and potentially unresolvable, issue into each bail revocation proceeding. Rather, to prevent serious unfairness the Act must not apply to the *class* of persons already released on bail on October 12, avoiding unfairness by creating a bright, judicially administrable line.

Further, the government argues that not to apply the new provision **retroactively** leaves it without a remedy against one (allegedly like the defendant here) who commits a crime while free on bail. This is not so. For one thing the government could indict the person for that crime (whether it was committed before or after October 12, 1984), at which point the government could seek his **detention** under the new law. For another thing, the new Bail Act allows the magistrate to attach a new condition to a defendant's pre-October 12 bail order-the condition that he not commit new crimes while on release. To attach this condition to the bail of one previously released does not seem unfair. Indeed, the old Act provides magistrates and judges with the express authority to modify release conditions. *See*18 U.S.C. § 3146(e) (repealed October 12, 1984). In this case, the magistrate attached a condition on October 31, 1984, that Zannino not commit any crimes while on release. Thus, Zannino's release conditions currently (and lawfully) permit revocation if the government shows that he has committed crimes after October 31, 1984. *See*§ 3148(b). In addition, the government is free to seek his indictment for any offense committed before that date, or to seek further modification of his release conditions, § **3142**(c).

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Finally, the majority points to a provision in the former 1966 law that allows a magistrate to impose "additional or different conditions of release" upon a person free on bail. Bail Reform Act of 1966, 18 U.S.C. § 3146(e), *repealed by* Bail Reform Act of 1984, 18 U.S.C. § **3142**(c). The majority thinks the existence of this provision makes it more fair to apply the new law **retroactively** to those already free on bail. I disagree, basically because a new "release" condition seems to me very different from an unconditional **detention** order.

For the foregoing reasons, I believe Congress did not intend the "dangerous person **detention**" provision of the new Bail Act to apply to those already free on bail on October 12.

And, I would affirm the judgment of the district court.

C.A.1 (Mass.),1985.
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761 F.2d 52

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765 F.2d 944
765 F.2d 944, 53 USLW 2628
(Cite as: 765 F.2d 944)

U.S. v. Affleck
C.A.10,1985.

United States Court of Appeals,Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Grant C. AFFLECK, Defendant-Appellant.
UNITED STATES of America, Plaintiff-Appellee,
v.
Frank KOWALIK, Jr., Defendant-Appellant.
Nos. 85-1009, 84-2600.

May 24, 1985.

Defendants challenged denial by the United States District Court for the District of Utah, David K. Winder, J., and the United States District Court for the District of Colorado, Zita L. Weinshienk, J., of motions for bail pending appeal. After panel denied motions for release pending appeal, rehearing en banc was granted, with the Court of Appeals, Holloway, Chief Judge, holding that: (1) Bail Reform Act section setting forth standards governing release of defendants on bail pending appeal applied to defendants even though they were convicted before effective date of the Act; (2) application of the new standards to defendants convicted before effective date of the Act did not disadvantage them in any way prohibited by the ex post facto clause; (3) two-step analysis for determining whether to grant bail pending appeal would be adopted, though with stricter interpretation of what constitutes "substantial" question of law or fact than that applied by the Third Circuit; and (4) need for a clear record at district court hearing warranted partial remand.

Cases partially remanded.

McKay, Circuit Judge, dissented and filed opinion, in which Seymour, Circuit Judge, joined, also filing a separate dissenting opinion.

West Headnotes

[1] Bail 49 ⇐44(1)

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k44 Pending Appeal or Other Proceeding for Review
49k44(1) k. In General; Conditions. Most Cited Cases
There is no constitutional right to bail pending appeal.

[2] Bail 49 ⇐39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases
Section of Bail Reform Act [18 U.S.C.A. § 3143(b)] setting forth standards governing release of defendants on bail pending appeal, became fully effective on October 12, 1984 and applied to defendants seeking bail pending appeal after that date, even though they were convicted before the Act's effective date.

[3] Bail 49 ⇐39

49 Bail
49II In Criminal Prosecutions
49k39 k. Nature and Scope of Remedy. Most Cited Cases

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Constitutional Law 92 ⚿2810

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(B) Particular Issues and Applications
92k2809 Criminal Proceedings
92k2810 k. In General. Most Cited Cases
(Formerly 92k203)
Application of new Bail Reform Act [18 U.S.C.A. § 3143(b)] standards governing release of defendants on bail pending appeal to defendants convicted before effective date of the Act did not disadvantage defendants in any way prohibited by the ex post facto clause, though the sentences and the district court orders denying bail pending appeal were entered after that date; the Act introduced significant procedural change, disadvantageous to defendants, but it did not change the quantum of punishment attached to the crimes. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[4] Bail 49 ⚿44(4)

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k44 Pending Appeal or Other Proceeding for Review
49k44(3) Grounds for Grant or Denial
49k44(4) k. Substantiality of Grounds for Review; Delay. Most Cited Cases
Two-step analysis announced in *United States* [redacted] for determining whether to grant bail pending appeal under the Bail Reform Act [18 U.S.C.A. § 3143(b)] would be adopted in the Tenth Circuit, with first inquiry being whether appeal raises "substantial" question of law or fact, and, secondly, whether resolution of that question in favor of defendant is likely to result in reversal or order for new trial of all counts on which imprisonment has been imposed; however, Tenth Circuit will apply stricter interpretation of what constitutes "substantial" question of law or fact than applied in [redacted].

[5] Bail 49 ⚿44(4)

49 Bail
49II In Criminal Prosecutions
49k41 Right to Release on Bail
49k44 Pending Appeal or Other Proceeding for Review
49k44(3) Grounds for Grant or Denial
49k44(4) k. Substantiality of Grounds for Review; Delay. Most Cited Cases
For purposes of determining whether defendant seeking bail pending appeal under the Bail Reform Act [18 U.S.C.A. § 3143(b)] has raised a substantial question of law or fact, a "substantial" question is one of more substance than would be necessary to a finding that it was not frivolous; it is a close question or one that very well could be decided the other way, but whether it has been treated by controlling precedent is not determinative; whether particular question is "substantial" must be determined on case-by-case basis.

[6] Criminal Law 110 ⚿1181.5(3.1)

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1181.5 Remand in General; Vacation
110k1181.5(3) Remand for Determination or Reconsideration of Particular Matters
110k1181.5(3.1) k. In General. Most Cited Cases

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(Formerly 110k1181.5(3))
Need for a clear record at hearing in the district court in order to resolve question whether defendants were entitled to bail pending appeal under Bail Reform Act [18 U.S.C.A. § 3143(b)] standards warranted partial remand for such hearings and reconsideration of denials of motions for bail pending appeal under standards adopted herein.

***945** A. Brent Carruth, Carruth & Goodwin, Van Nuys, Cal. (Eric A. Goodwin, Carruth & Goodwin, Van Nuys, Cal., with him on the briefs), for defendant-appellant Affleck.
Brent D. Ward, U.S. Atty., Salt Lake City, Utah (David Schwendiman, Sp. Asst. U.S. Atty., Salt Lake City, Utah, with him on the brief), for plaintiff-appellee U.S. in No. 85-1009.
Albert M. Pearson, University of Georgia School of Law, Athens, Ga., and Scott McLarty, Athens, Ga. (Cecil Hartman, Denver, Colo., with them on the brief), for defendant-appellant, Kowalik.
Thomas M. O'Rourke, Asst. [redacted] Atty., Denver, Colo. (Robert N. [redacted] U.S. Atty., with him on the brief), for plaintiff-appellee U.S. in No. 84-2600.
Michael L. Bender, Bender & Treece, and Jay P.K. Kenney, Denver, Colo., were on the brief in 84-2600 for amicus curiae Nat. Ass'n of Criminal Defense Lawyers.

Before HOLLOWAY, Chief Judge, and SETH, BARRETT, DOYLE, McKAY, LOGAN, and SEYMOUR, Circuit Judges [FN*].

FN* Senior Circuit Judges Seth and Doyle, as members of the panel which initially ruled on defendants' motions for release pending appeal, are participating in this en banc determination upon their election and designation. *See* 28 U.S.C. § 46(c).

HOLLOWAY, Chief Judge.

OPINION ON REHEARING EN BANC

These separate appeals from the District of Utah and the District of Colorado present important questions under the Bail Reform Act of 1984 ("Act"), enacted as part of the Comprehensive Crime Control Act of 1984, Title II of Pub.L. No. 98-473, 98 Stat. 1976, approved October 12, 1984. This court ordered rehearings en banc which were heard on March 12, 1985 in each case. This opinion disposes of the issues in both cases concerning bail pending appeal.

I

Facts

A. Affleck

Defendant Grant C. Affleck was convicted in the District of Utah on October 5, 1984 after a jury trial of six counts of security fraud,[FN1] one count of bankruptcy fraud,FN2 and one count of interstate transportation of a person to defraud.[FN3] On that date, the district court ordered Affleck released***946** on a $75,000 bond pending sentencing. The district court found that Affleck did not pose a danger to others or to the community, and that he was not likely to flee.

FN1. 15 U.S.C. § 78j; 17 C.F.R. § 240-10b-5.

FN2. 18 U.S.C. §§ 152, 2.

FN3. 18 U.S.C. § 2314.

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On November 16, Affleck was sentenced to ten years' imprisonment and five years' probation. On November 19, Affleck filed a notice of appeal. On November 20 the district court, in response to Affleck's ex parte motion, stayed execution of the sentence upon filing of the same bond maintained by Affleck during the trial. The district court found that Affleck posed "no immediate threat of fleeing during appeal and no immediate danger to society during that period." VIII R. 1438-39.

On November 21, the Government filed a motion in the district court to reconsider its order staying execution of Affleck's sentence and ordering his release pending appeal, or in the alternative, to hold an expedited hearing and to make the findings to support such an order as required by 18 U.S.C. § 3143(b), as amended by the new Act. Section 203(a) of the Act changed the standards governing release of convicted defendants on bail pending appeal.

Under former 18 U.S.C. §§ 3146 and 3148, convicted defendants were entitled to release on bail pending appeal unless no one or more conditions of release would reasonably assure that they would not flee or pose a danger to any other person or to the community, or unless their appeal was frivolous or taken for purpose of delay. The burden was on the Government under the former law to show that the appeal was frivolous and was taken for purpose of delay; the defendant bore the burden of showing he would not flee and was not a danger to any person or the community. *See also* former Fed.R.App.P. 9(c). The Act changed the criteria for release on bail pending appeal and placed the burden on the convicted defendant to prove that he meets all the new criteria. Current 18 U.S.C. § 3143(b) provides as follows:

> Release or **Detention** Pending Appeal by the Defendant.-The judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds-
>
> (1) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released pursuant to section **3142**(b) or (c); *and*
>
> (2) that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

Act § 203(a), 98 Stat. 1981-82 (emphasis added); *see also*Fed.R.App.P. 9(c), as amended by Act § 210, 98 Stat. 1987.

Affleck principally argued below that he was entitled to bail pending appeal because the former law entitled him to that relief, and that application to him of the new Act would violate the *ex post facto* clause. After a hearing, the district court on December 11 vacated its earlier order. The court held that Affleck had established by clear and convincing evidence under § 3143(b)(1) that he was not likely to flee or pose a danger to the safety of any other person or to the community if he were released on a $75,000 bond pending appeal. The court also held that Affleck had established that his appeal was not taken for purpose of delay under § 3143(b)(2). The court denied bail, however, because Affleck did not establish that his appeal raised a substantial question of law or fact likely to result in reversal or an order for a new trial under § 3143(b)(2). VIII R. 1490. The court also held that application of the

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new criteria of § 3143(b) to deny Affleck bail pending appeal did not violate the *ex post facto* clause, even though he would have been entitled to bail under the law in effect when the offenses were committed and when the guilty verdicts were returned. *Id.* at 1491-95.

B. Kowalik

Defendant Frank Kowalik, Jr. was convicted in the District of Colorado on September 19, 1984 after a jury trial of two ***947** counts of willfully failing to file federal income tax returns in violation of I.R.C. § 7203. On November 14 the district court sentenced Kowalik to one year of imprisonment and a $10,000 fine on each count. The district court on that date also ordered Kowalik's release pending appeal upon filing of a $20,000 bond. The court found that Kowalik did not pose a danger to the community and was not likely to flee. I R. 123.

Also on November 14 Kowalik filed a notice of appeal and sought release on the appeal bond, but the magistrate concluded that release was inappropriate absent findings by the district court under § 3143(b). Kowalik principally argued that he was entitled to bail pending appeal under the former law. He also contended that he raised substantial questions likely to result in reversal or an order for a new trial under the new Act. He argued that the trial court erred in its instructions because they did not properly treat his defenses of not willfully and knowingly intending a violation of the tax law, and that the instructions did not properly cover the effect of evidence from his character witnesses. After a hearing on November 15, the district court vacated its earlier order permitting Kowalik to be released on bail pending appeal. The court found that Kowalik had established by clear and convincing evidence under § 3143(b)(2) that he was not a threat to any other person or to the community and was not likely to flee. IX R. 4-5. However, the court held that Kowalik's appeal did not raise a substantial question of law or fact likely to result in reversal or an order for a new trial under § 3143(b)(2), and denied bail. *Id.* at 3.

C. Proceedings in this court

Both Affleck and Kowalik challenge the district courts' denial of their motions for release pending appeal. A panel of this court denied the motions for release pending appeal.[FN4] On its own motion this court, by order of a majority of its active circuit judges on February 1, 1985, granted rehearing en banc of of the court's earlier orders denying the motions for release pending appeal.[FN5] We expedited these cases for argument at our March term of court and asked counsel to brief and argue the effect of the new § 3143(b) standards in these cases. We now address various issues concerning the application to these defendants of the new § 3143(b) criteria for release pending appeal.

FN4. Kowalik's petition for a stay pending appeal was denied by order of a panel of this court on December 4, 1984. Affleck's motion for release pending appeal was denied by order of a panel of this court on December 27, 1984.

FN5. Chief Judge Holloway and Judge Barrett voted to deny rehearing en banc.

II

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Effective Date and the Ex Post Facto Clause

A. **Effective date**

Affleck asserts that Congress did not intend the Bail Reform Act to apply to those convicted of crimes before October 12, 1984. He relies on cases holding that other provisions of the Bail Reform Act do not apply to defendants released on bail before that date. *See United States v. Fernandez-Toledo,* 749 F.2d 703 (11th Cir.1985) (§ 3731, which permits the Government to appeal order granting bail); *United States v. Mitchell,* 600 F.Supp. 164 (N.D.Cal.1985) (§ **3142**, which provides for pretrial **detention**). *But see United States v. Anguilo,* 755 F.2d 969, 970-74 (1st Cir.1985) (application of pretrial **detention** provisions of new Act to a defendant incarcerated and seeking release on October 12). Affleck also cites *Greene v. United States,* 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964), and argues that criminal statutes like § 3143(b) should not be given retrospective operation where to do so would interfere with antecedent rights. *See also Fernandez-Toledo,* 749 F.2d at 705 (defendant released on bail prior to effective date of the Act had a vested, antecedent right to bail).

***948** [1][2] We are not persuaded by these cases that the Act should not apply to a defendant like Affleck, convicted before October 12, who seeks bail pending appeal after that date. There is no constitutional right to bail pending appeal. *See, e.g., United States v. Provenzano,* 602 F.Supp. 230, 232 (E.D.Pa.1985); *United States ex rel. Cameron v. New York,* 383 F.Supp. 182, 183 (E.D.N.Y.1974).[FN6] In these circumstances, we hold that § 3143(b), in the absence of a showing of congressional intent to the contrary, became fully effective on October 12 when the President approved the Act. Section 3143(b) therefore applies to Affleck even though he was convicted before the effective date of the Act. *See United States v. Cirrincione,* 600 F.Supp. 1436, 1438 (N.D.Ill.1985); *see also United States v. Chiattello,* 599 F.Supp. 970, 971-72 (N.D.Ind.1985); *United States v. Hazzard,* 598 F.Supp. 1442, 1454 n. 8 (N.D.Ill.1984); *United States v. Kowal,* 596 F.Supp. 375, 376 (D.Conn.1984); *see also United States v. Gavrilovic,* 551 F.2d 1099, 1103 (8th Cir.1977); *United States v. Clizer,* 464 F.2d 121, 123 n. 2 (9th Cir.), *cert. denied,*409 U.S. 1080, 93 S.Ct. 679, 34 L.Ed.2d 669 (1972).

> FN6. The legislative history of the Bail Reform Act notes that "there is clearly no constitutional right to bail once a person has been convicted." S.Rep. No. 98-225, 98th Cong., 2d Sess. 26, *reprinted in*1984 U.S.Code Cong. & Ad.News 3182, 3209 (footnote omitted).

B. **The ex post facto clause**

[3] Affleck and Kowalik both argue that application to them of the new § 3143(b)(2) standards governing bail pending appeal violates the *ex post facto* clause because they were convicted before the effective date of the Act. We disagree.

The Constitution provides that no "ex post facto [l]aw shall be passed." U.S. Const. art. I, § 9, cl. 3.[FN7] The *ex post facto* clauses forbid the enactment by Congress and the states of any law that "imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then

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prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Cummings* [redacted] *Missouri,* 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 356 (1867); *see also Weaver* [redacted] *Graham,* 450 U.S. 24, 28, 101 S.Ct. 960, 963, 67 L.Ed.2d 17 (1981).[FN8]

FN7. The Constitution also prohibits the states from passing *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1 ("No State shall ... pass any ... ex post facto [l]aw....").

FN8. The Court has emphasized that "[t]he mark of an *ex post facto* law is the imposition of what can fairly be designated *punishment* for past acts." *De Veau* [redacted] *Braisted,* 363 U.S. 144, 160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109 (1960) (plurality opinion) (emphasis added). *See also Beazell* [redacted] *Ohio,* 269 U.S. 167, 169-70, 46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925) ("[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*"); *Paschal* [redacted] *Wainwright,* 738 F.2d 1173, 1176 n. 4 (11th Cir.1984) (emphasis in original) (For *ex post facto* violation to have occurred, "the legislature must provide *punishment* for past conduct.").

The Court has stated that "no *ex post facto* violation occurs if the change effected is merely procedural, and does 'not increase the punishment[,] nor change the ingredients of the offen[c]e or the ultimate facts necessary to establish guilt.' " *Id.* at 29 n. 12,101 S.Ct. at 964 n. 12 (quoting *Hopt* [redacted] *Utah,* 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884) (brackets added to conform to original quotation in *Hopt*)); *see also Dobbert* [redacted] *Florida,* 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto.*"); *Beazell* [redacted] *Ohio,* 269 U.S. 167, 171, 46 S.Ct. 68, 69, 70 L.Ed. 216 (1925) (*ex post facto* clause not intended to "limit the legislative control of remedies and modes of procedure which do not affect matters of substance"). The Court has held that "two critical elements must be present for a ***949** criminal or penal law to be *ex post facto:* it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver* [redacted] *Graham,* 450 U.S. at 29, 101 S.Ct. at 964 (footnotes omitted).[FN9]

FN9. *See also Paschal* [redacted] *Wainwright,* 738 F.2d 1173, 1175-76 (11th Cir.1984); *Artez* [redacted] *Mulcrone,* 673 F.2d 1169, 1171 (10th Cir.1982); *see generally* J. Nowak, R. Rotunda & J. Young, *Constitutional Law* 477-78 (2d ed. 1983); L. Tribe *American Constitutional Law* 477-84 (1978).

We hold that application of the new § 3143(b)(2) standards governing bail pending appeal to a defendant convicted before the effective date of the Act does not disadvantage the defendant in any way prohibited by the *ex post facto* clause. Section 3143(b)(2) represents a significant procedural change in the requirements that a convicted defendant must meet to obtain

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bail pending appeal, one seriously disadvantageous to him in that respect, but the statute does not change the "quantum of punishment attached to the crime." *Dobbert,* 432 U.S. at 294, 97 S.Ct. at 2298. We agree with other cases, which have similarly held that § 3143(b) does not violate the *ex post facto* clause. *See United States [redacted] Powell,* 761 F.2d 1227, 1234 (8th Cir.1985) (en banc) (footnote omitted) ("Admission to bail pending appeal is, for Ex Post Facto Clause purposes, 'procedural'. It does not increase the punishment for a crime already committed, but simply regulates the time at which imprisonment for that crime will begin after conviction"); *United States [redacted] Molt,* 758 F.2d 1198, 1200-01 (7th Cir.1985) ("We think the change in the standard for bail pending appeal is not an ex post facto law.... [T]he **presumption** is against construing a procedural change as an ex post facto law, and must carry the day in the absence of a stronger showing than made in this case that the change works an increase in punishment.... The change in the balance of advantages against the defendant is too slight to bring the change within the scope of the ex post facto clause."); *United States [redacted]* 753 F.2d 19, 21 (3d Cir.1985) ("The availability *vel non* of bail pending appeal, albeit extremely important to the individual involved, is a procedural issue rather than a type of punishment to which the *Ex Post Facto* Clauses apply."); *United States [redacted] Crabtree,* 754 F.2d 1200, 1201-02 (5th Cir.1985) (opinion of Chief Judge Clark as a single circuit judge) ("[(Section 3143(a)(1)] is merely procedural and does not alter a substantive right. [It] does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt."); *United States [redacted] Chiattello,* 599 F.Supp. 970, 971 n. 1 (N.D.Ind.1985) ("The method governing the release of a defendant on appeal following a conviction is a matter of procedure and does not bear on substantive rights."); *United States [redacted]* 598 F.Supp. 453, 468 (S.D.N.Y.1984) (on motion to revoke bail) ("[Defendant's] entitlement to bail, and the criteria by which that entitlement will be measured, constitute 'modes of procedure' falling outside the *ex post facto* rule, notwithstanding the fact that increased restrictions upon bail pending appeal may undoubtedly 'work to the disadvantage' of defendants.").

In reaching this conclusion, we are mindful of the Supreme Court's decision in *Kring [redacted] Missouri,* 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883). In *Kring,* the Court held that an *ex post facto* violation had occurred where the Missouri courts had imposed a death penalty by a second sentence in a murder case. A former plea of guilty to a second degree murder charge had resulted in a twenty-five year sentence; the defendant appealed and the judgment was reversed. Under Missouri law in force when the homicide was committed, the first sentence constituted an acquittal of first degree murder. Before retrial, the state law was changed so that this effect of an acquittal of first degree murder no longer operated. The defendant refused to withdraw his plea of guilty to second degree murder or to reenter a not guilty plea to the first degree murder charge. The trial court ordered a general not guilty plea entered to the first degree murder charge. The retrial, guilty verdict and death sentence followed, which the Missouri courts ***950** affirmed. The Supreme Court reversed. The Court upheld the *ex post facto* claim and rejected the contention that the change in state law was merely a change in criminal procedure. *Id.* at 232-36, 2 S.Ct. at 452-55. The troublesome discussion is as follows:

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> But it cannot be sustained without destroying the value of the constitutional provision, that a law, however it may invade or modify the rights of a party charged with crime, is not an *ex post facto* law, if it comes within either of these comprehensive branches of the law designated as Pleadings, Practice, and Evidence.
>
> *Can the law with regard to bail,* to indictments, to grand jury, to the trial jury, all be changed to the disadvantage of the prisoner by State legislation after the offence was committed, and such legislation not held to be *ex post facto* legislation, because it relates to procedure, as it does according to [*Bishop on Criminal Procedure*]?
>
> And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Id. at 232, 2 S.Ct. at 452 (emphasis added).

We believe that *Kring* and its dictum respecting bail must be read in light of later Supreme Court opinions on the *ex post facto* clause. In *Beazell,* for example, the Court stated that "[e]xpressions are to be found in earlier judicial opinions to the effect that the [*ex post facto* clause] may be transgressed by alterations in the rules of evidence or procedure." 269 U.S. at 170, 46 S.Ct. at 68 (citing *Kring, inter alia*). The Court conceded that there "may be procedural changes which operate to deny to the accused a defense available at the time of the commission of his offense, or which otherwise affect him in such a harsh and arbitrary manner as to fall within the constitutional prohibition." *Id.* The Court noted that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial rights against arbitrary and oppressive legislation."269 U.S. at 171, 46 S.Ct. at 69.

In *Kring,* the Court explained that the effect of the change in state law, which was denied application there as *ex post facto,* was that formerly conclusive evidence of innocence of the higher grade of murder could not be received at all, or was given no weight, and that the law on punishment was changed from a bar against the death penalty in such circumstances to a new law permitting such punishment. 107 U.S. at 228, 2 S.Ct. at 449. Although we are bound by that holding in *Kring,* we must view the statements concerning bail and procedural changes in *Kring* in light of the *ex post facto* standards applied by the Court in subsequent cases. We are particularly persuaded by the Court's more recent focus in *ex post facto* cases on the elements of the offense, the conditions and quantum of punishment, and the quantity and degree of proof necessary to establish guilt. *See, e.g., Weaver* [redacted] *Graham,* 450 U.S. at 32-33, 101 S.Ct. at 966-967; *Dobbert,* 432 U.S. at 295, 97 S.Ct. at 2299. In light of these standards, we conclude that there is no *ex post facto* violation here by application of the new restrictive rules governing bail pending appeal, as now prescribed by § 3143(b)(2).

We are unpersuaded by the reasoning in *United States* [redacted] *Cirrincione,* 600 F.Supp. 1436 (N.D.Ill.1985). There the district

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court held that § 3143(b)(2) violates the *ex post facto* clause. The court reasoned that a sentence which begins immediately is more severe than a sentence which commences after an unsuccessful appeal. *Id.* at 1443-46. The court said that "[w]hile the Supreme Court has not always been clear on the underlying rationales for the *ex post facto* clause, certainly one rationale is that an individual who acts in reliance upon the known criminal penalties for his acts must be punished in accordance with that reliance." *Id.* at 1444.

***951** Although we agree that the ex post facto clauses protect an individual who acts in reliance on the known criminal penalties for his conduct, we cannot accept the *Cirrincione* court's view that § 3143(b)(2) affects the punishment imposed for such conduct. A convicted defendant may wish to postpone serving his sentence until his appeal is decided, and certainly the § 3143(b)(2) standards for granting bail pending appeal are "more onerous" than those under the former law. However, § 3143(b)(2) does not in any way alter the "quantum of punishment" imposed on criminal defendants, or the elements and required proof of the offense, which are the main focus of the Supreme Court's more recent decisions. *Dobbert* illustrates the fact that significant changes, even in the procedure for imposition of the death penalty, do not necessarily violate the *ex post facto* clause.

Our conclusion is also supported by state court decisions which have upheld changes in statutes governing bail pending appeal against *ex post facto* challenges. For example, the Indiana Supreme Court has held that a state statute denying bail pending appeal by a habitual criminal was not *ex post facto* as applied to a defendant who committed the offense and was convicted before the effective date of the statute. *State ex rel. Dorton* [redacted] *Circuit Court of Elkhart County,* 274 Ind. 373, 412 N.E.2d 72 (1980).[FN10] The court explained that the superseding statute did "not make an act criminal which was legal before the statute; nor [did] it 'provide a greater punishment therefor than was prescribed at the time of its commission.' " *Id.* at 74 (quoting *Hopt* [redacted] *Utah,* 110 U.S. 574, 579, 4 S.Ct. 202, 204, 28 L.Ed. 262 (1884)).

> FN10. The court explained that "[t]he necessity to protect society against further criminal acts by a convicted, but unpunished, person [by denying bail pending appeal] outweighs society's interest in protecting persons who may have a reversible conviction." 412 N.E.2d at 74.

Moreover, the Oklahoma Court of Criminal Appeals has held that a state statute prohibiting bail pending appeal if a defendant was convicted of rape or forcible sodomy, among other things, was not *ex post facto* as applied to a defendant who committed the offense before the effective date of the statute. *Spitznas* [redacted] *State,* 648 P.2d 1271 (Okla.Crim.App.1982). The court concluded that the statute was procedural and did not inflict greater punishment than the law imposed at the time the offense was committed. *Id.* at 1275-76.

In addition, the District of Columbia Court of Appeals has held that a statute providing for pretrial **detention** of defendants charged with first degree murder was not *ex post facto* as applied to a defendant who committed the crime before the effective date of the statute. *De Veau* [redacted] *United States,* 454 A.2d 1308 (D.C.App.1982), *cert. denied,*460 U.S. 1087, 103 S.Ct.

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1781, 76 L.Ed.2d 351 (1983). The court emphasized that the statute did not "impose (or increase) punishment ... or [make] formerly legal conduct a crime." *Id.* at 1314.[FN11]

FN11. *But see Greene* [redacted] *State,* 238 So.2d 296, 300-01 (Fla.1970) (application of bail statute to deny bail pending appeal from conviction on second felony violated *ex post facto* clauses where bail statute became effective after commission of second felony); *Cunningham* [redacted] *State,* 423 So.2d 580 (Fla.Dist.Ct.App.1982) (per curiam) (*ex post facto* clause prohibited application of statute denying bail pending appeal of drug trafficking conviction to defendant who committed offense before effective date of statute); *cf. Parker* [redacted] *State,* 667 P.2d 1272 (Alaska Ct.App.1983) (right to bail pending appeal sufficiently accrued at time of offense under state statute so that statute passed after date of offense but before conviction which eliminated bail for persons convicted of certain felonies did not apply to defendant); *Ellis* [redacted] *State,* 544 S.W.2d 908, 911 (Tenn.Crim.App.1976) (statute denying bail pending appeal to defendants convicted of possession of controlled substances with intent to sell had "ex post facto overtones" when applied to defendants who were arrested after effective date of statute).

We therefore hold that the § 3143(b)(2) standards governing bail pending appeal are not *ex post facto* as applied to a defendant where the offenses charged and the resulting convictions occurred before the effective date of the Act, but the sentences and the order by the district court denying bail pending appeal were entered after that date.

***952** III

Interpretation of 18 U.S.C. § 3143(b)(2)

[4] Section 3143(b)(2) as amended by the Bail Reform Act requires that bail pending appeal be denied unless the court finds that the appeal "raises a substantial question of law or fact likely to result in reversal or an order for a new trial." The parties in both the *Affleck* and *Kowalik* cases contend that we should interpret this requirement in light of the two-step analysis announced by the Third Circuit in *United States* [redacted], 753 F.2d 19 (3d Cir.1985). The Government, however, argues that a stricter interpretation than that of [redacted] should be applied to determine what constitutes a "substantial" question of law or fact.

In [redacted] the Third Circuit held that the language quoted above requires the court to make two determinations in order to grant bail pending appeal. First, the court must decide that the appeal raises a "substantial" question of law or fact. Second, "if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." *Id.* at 24. This approach has been followed in other cases. *See United States* [redacted] *Powell,* 761 F.2d 1227, 1230-1234 (8th Cir.1985) (en banc); *United States* [redacted] *Handy,* 761 F.2d 1279, 1280 (9th Cir.1985) (per curiam); *United States* [redacted] *Giancola,* 754 F.2d 898, 900-901 (11th Cir.1985); *see also United States* [redacted] *Polin,* Nos. 85-5009,

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85-5010, slip op. at 2 (4th Cir. March 4, 1985) (opinion of Murnaghan, Circuit Judge, as a single circuit judge). We adopt the [redacted] two-step analysis for determining whether to grant bail pending appeal under § 3143(b), but we apply a somewhat stricter interpretation of what constitutes a "substantial" question of law or fact, which we believe the statute and its purpose require.

What constitutes a "substantial" question under the first prong of this test must be considered in light of congressional intent. Under former § 3148, bail pending appeal would be denied if the appeal was "frivolous." The new Act was intended to reverse the **presumption** in favor of bail pending appeal under the former law and to make the standards for granting bail pending appeal more stringent. *See*S.Rep.No. 225, 98th Cong., 1st Sess. 26-27, *reprinted in*1984 U.S.Code Cong. & Ad.News 3182.

[5] Accordingly, we agree with the Eleventh Circuit that "a 'substantial question' is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *Giancola,* 754 F.2d at 901. In [redacted] the Third Circuit said that a "substantial" question under § 3143(b)(2)"is one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful." [redacted] 753 F.2d at 23.[FN12] We agree with the Eleventh Circuit, however, that a question "which has not been decided by controlling precedent" may not be "substantial" under § 3143(b)(2). For example, an issue may be "so patently without merit that it has not been found necessary for it to have been resolved.... Similarly, there might be no precedent in this circuit, but there may also be no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits." *Giancola,* 754 F.2d at 901.FN13 In the final analysis, we cannot define blanket categories for what will constitute "substantial" questions under § 3143(b)(2). Therefore, whether a particular question is "substantial" must be determined on a case-by-case basis, under the general guidelines we adopt as quoted above. *See Giancola,* 754 F.2d at 901.

FN12. *See also Handy,* 761 F.2d at 1281 ("substantial" question is one that is "fairly debatable").

FN13. Of course, a "substantial" question must be one which can be properly raised on appeal. *See Gianola,* 754 F.2d at 901 n. 4.

The second prong of the [redacted] test poses less of a definitional problem. Under this second prong, bail pending appeal is ***953** appropriate if, assuming that the "substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed." [redacted] 753 F.2d at 24. The Third Circuit further explained that this language

> must be read as going to the significance of the substantial issue to the ultimate disposition of the appeal. A question of law or fact may be substantial but may, nonetheless, in the circumstances of a particular case, be considered harmless, to have no prejudicial effect, or to have been insufficiently preserved. A court may find that reversal or a new trial is "likely" only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be

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imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial.

Id. at 23.[FN14]

FN14. The Third Circuit rejected the view that § 3143(b)(2) requires the district court to grant bail pending appeal only upon finding that its own rulings were likely to be reversed on appeal for two reasons:

> In the first place, such a reading would render language in the statute surplusage because every question that is likely to be reversed must by definition be "substantial". In the second place, we are unwilling to attribute to Congress the cynicism that would underlie the provision were it to be read as requiring the district court to determine the likelihood of its own error. A district judge who, on reflection, concludes that s/he erred may rectify that error when ruling on post-trial motions. Judges do not knowingly leave substantial errors uncorrected, or deliberately misconstrue applicable precedent. Thus, it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.
>
> For a similar reason, the phrase "*likely* to result in reversal or an order for a new trial" cannot reasonably be construed to require the district court to predict the probability of reversal. The federal courts are not to be put in the position of "bookmakers" who trade on the probability of ultimate outcome.

[redacted] 753 F.2d at 23; *see also Polin, slip op. at 2 n 2; Handy,* 761 F.2d at 1280; *Giancola,* 754 F.2d at 900.

In sum, we hold that in order to grant bail pending appeal, a court must find that the defendant has met his burden of proving by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or to the community if released under § 3143(b)(1), and that he has established under § 3143(b)(2) FN15 that the appeal is not for purpose of delay, and:

FN15. We note that, unlike § 3143(b)(1), § 3143(b)(2) does not require that the showing be made by "clear and convincing evidence." We therefore conclude that a defendant must only prove the § 3143(b)(2) criteria under the ordinary preponderance of the evidence standard.

> [1.] that the appeal raises a substantial question of law or fact; and
>
> [2.] that if that substantial question is determined favorably to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

Id. at 24.

IV

Disposition

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[6] In *Affleck,* both the defendant and the Government agree that we should remand the case to the district court to reconsider the issue of bail pending appeal under the [redacted] two-part standard, disagreeing only on how to determine a "substantial" question of law or fact, which we have resolved. In *Kowalik,* however, both the defendant and the Government apparently agree that a remand is not appropriate. Kowalik argues that we should grant him bail pending appeal under the test he espouses, while the Government argues that we should deny bail under the standard it proposes.

We conclude that the proper disposition is to remand both cases for the district court to make findings and conclusions under the standard for determining bail on appeal which we adopt today. The Third and Eleventh Circuits made this disposition in ***954***Miller* and *Giancola.* [redacted] 753 F.2d at 24; *Giancola,* 754 F.2d at 901 & n. 5.FN16 This disposition comports with Fed.R.App.P. 9(b). Rule 9(b) requires that applications for bail pending appeal be made "in the first instance in the district court." *Id.* The rule also requires the district court to "state in writing the reasons" if the court denies release pending appeal or imposes conditions on release. *Id.* The rule contemplates that the district court is in a better position to evaluate, in the first instance, the propriety of granting bail pending appeal. The rule also aids our appellate function by requiring the district court to make written findings and conclusions.

> FN16. In *Polin,* a single judge of the Fourth Circuit adopted the [redacted] standard and agreed with the district court's denial of bail pending appeal because the defendant did not meet his burden of showing that his appeal raised a "substantial" question. *Polin,* slip op. at 3-4.
>
> In *Handy,* the Ninth Circuit adopted the [redacted] standard and disagreed with the district court's denial of bail pending appeal. The Ninth Circuit granted bail pending appeal and held that the defendant had met his burden of proving that his appeal raised a "substantial or 'fairly debatable' question of the type that calls into question the validity of the judgment." *Handy,* 761 F.2d at 1283. The Ninth Circuit remanded to the district court for imposition of the appropriate conditions of release.

These proceedings obviously present difficulties for the parties, as well as for the trial and appellate courts. We are convinced that those difficulties will be lessened if a clear record at a hearing is made in the trial court. As noted, the defendant bears the burden of making the showings outlined above on the facts and the law, and he must present sufficient portions of the record to support the questions he raises. If this is not done, as to evidentiary matters we must give considerable deference to the trial court's determination on the substantiality of questions of fact. We can, like the trial court, independently consider questions of law.

Accordingly, we partially remand these cases to the district courts for hearings and reconsideration of the denials of the motions for bail pending appeal under the standards we adopt today, and for the district courts to make new written findings, conclusions and orders under these standards. This court otherwise retains jurisdic-

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tion of the principal appeals in these cases. The mandates for the partial remands shall issue forthwith.

McKAY, Circuit Judge, dissenting:
Since our country's inception, liberty has held a preeminent place in our pantheon of values. Our founding fathers took care to preserve it through a wealth of carefully crafted constitutional safeguards. Among them are the eighth amendment's proscription of excessive bail, the due process clause, and the ex post facto clause. In my view, the court has trivialized each of these safeguards in sustaining the constitutionality of the bail pending appeal provisions of the Bail Reform Act of 1984, and in approving the application of these provisions to defendants who were convicted of crimes committed before the Act's passage.

I believe that this is, in large measure, a consequence of the court's preoccupation with attempting to ameliorate the harsh effects of these provisions. Had the court held fast to the actual intent of Congress, the constitutional infirmity of the statute would have been readily apparent.

When the standard for release of a convicted person pending appeal under 18 U.S.C. § 3143 was first considered by trial courts and by a panel of this court, they all concluded that Congress did indeed mean what it said-bail should be denied unless the trial court finds:

> that the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.

18 U.S.C. § 3143(b).

These early decisions took the statute to mean that for all practical purposes Congress intended to eliminate bail pending appeal in all but the most extraordinary cases. Subsequently, the Third Circuit fabricated from rules of judicial construction an intent that gives the appearance of significantly ameliorating the harshness of ***955** the provision-even though there is no evidence that Congress had such a construction in mind. *United States* [redacted] 753 F.2d 19 (3rd Cir.1985). Other circuits quickly fell in line. *United States* [redacted] *Handy,* 761 F.2d 1279 (9th Cir.1985) (per curiam); *United States* [redacted] *Giancola,* 754 F.2d 898 (11th Cir.1985); *see also United States* [redacted] *Polin,* Nos. 85-5009, 85-5010, slip op. at 2 (4th Cir. March 4, 1985) (opinion of Murnaghan, C.J., as a single circuit judge).

In this case the majority, adopting the reasoning of both the Third and Eleventh Circuits, rewrites the statutory provision to read that bail may be granted by the trial court if:

> 1. the appeal raises a substantial question of law or fact; and
>
> 2. if that substantial question is determined favorably to the defendant on appeal, the decision is likely to result in reversal or an order for a new trial on all counts for which imprisonment has been imposed.

Thus, under the majority's attempted emasculation of the provisions of the Act, no determination need be made whether the substantial question is likely to be determined favorably upon appeal; it need only be decided whether that substantial question would likely result in reversal *if* it is so resolved on appeal.

In my view, it is regrettable that the courts have not held fast to the actual intent of Congress. This supposed amelioration will

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likely prove to be no amelioration at all. I am fully satisfied that the result will be essentially the same as it would were the statute interpreted literally-the denial of bail to the overwhelming majority of persons who previously would have received bail pending appeal. Such exceptions as may exist under the newly established standards will be at best quixotic.[FN1]

> FN1. By my calculation, sixty-three percent of direct appeals handled by this court in the most recent reporting period involved persons who were free on bail pending appeal. The new standards will not only eliminate bail in the overwhelming majority of those cases, but I am satisfied that it will be accident rather than design if even a substantial majority of those cases that we reverse coincide with the cases in which bail pending appeal is granted.

More important, in sorting through the theoretical niceties of supposedly ameliorative standards the courts have lost sight of the fact that the statute both as written by Congress and as rewritten by them allows for the punishment of a substantial class of individuals who have not yet been finally adjudicated guilty. I am convinced that denying bail under the test set forth in the panel's opinion is contrary to the Constitution of the United States.

CONSTITUTIONAL RIGHTS ON APPEAL

Until recently, it might have been argued that the constitutional rights that normally would attend preconviction proceedings do not accompany the appellate process. *See Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). However, the recent Supreme Court case of *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), has drastically changed this analysis. In *Evitts* the Court found that, where a state provides for an appeal as a matter of right, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection clauses of the Constitution." 469 U.S. at ----, 105 S.Ct. at 834. In holding that a defendant has a due process right to effective assistance of counsel on appeal, the Court stated that "in establishing a system of appeal as of right, the state had implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with law." 469 U.S. at ----, 105 S.Ct. at 840. The state was thus found to have "made the appeal the final step in the adjudication of guilt or innocence of the individual." [FN2] *Id.* ***956** Accordingly, in a system where a defendant has an appeal as of right, his guilt or innocence is not finally determined until the conclusion of his appeal. Under this rationale, all rights that apply to protect a defendant at the trial stage also apply at the appellate level, provided the appeal is a matter of right.

> FN2. Justice Rehnquist, writing in dissent, vehemently objected to this characterization as "inconsistent with the general view of state appellate review expressed ... in *Ross v. Moffitt,* supra, at 610-11 [, 94 S.Ct. at 2443-44]." 469 U.S. at ----, 105 S.Ct. at 844. *Ross* can be distinguished, however, on the ground that the appeal involved in that case was discretionary rather than as of right.

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As the Supreme Court has stated, "[p]resent federal law has made an appeal from a district court's judgment of conviction in a criminal case what is, in effect, a matter of right." *Coppedge v. United States,* 369 U.S. 438, 441, 82 S.Ct. 917, 918, 8 L.Ed.2d 21 (1962) (citing 28 U.S.C. §§ 1291, 1294; Fed.R.Crim.P. 37(a)). The federal courts have, therefore, made the appeal "the final step in the adjudication of guilt or innocence" and, under *Evitts,* the full panoply of constitutional rights applies until the conclusion of the appeal.

THE EIGHTH AMENDMENT

The traditional purpose of bail has been to ensure the presence of the defendant at trial. Higher bail than that amount reasonably calculated to fulfill this purpose is "excessive" in violation of the eighth amendment. *Stack v. Boyle,* 342 U.S. 1, 5, 72 S.Ct. 1, 3, 96 L.Ed. 1 (1951). It remains an open question, however, whether the eighth amendment provides a *right* to bail in cases where the defendant is not likely to flee. *Compare Escandar v. Ferguson,* 441 F.Supp. 53, 58 (S.D.Fla.1977) (finding that likelihood of flight is the only constitutionally permissible justification for denial of bail) *with United States v. Edwards,* 430 A.2d 1321 (D.C.App.1981), *cert. denied,*455 U.S. 1022, 102 S.Ct. 1721, 72 L.Ed.2d 141 (1982) (upholding the denial of bail for the purpose of protecting the community).[FN3] The Supreme Court has expressly reserved the question. *Bell v. Wolfish,* 441 U.S. 520, 534 n. 15, 99 S.Ct. 1861, 1871 n. 15, 60 L.Ed.2d 447 (1979) (refusing to decide whether any objective other than ensuring the defendant's presence at trial may constitutionally justify pretrial **detention**).

FN3. The denial of bail has historically been allowed in all capital cases, but this exception falls within the traditional justification of prevention of flight. *United States v. Kennedy,* 618 F.2d 557, 559 (9th Cir.1980) ("It has been thought that most defendants facing a possible death penalty would likely flee regardless of what bail was set, but those facing only a possible prison sentence would not if bail were sufficiently high.")

I would resolve the question left open in *Wolfish* by finding that prevention of flight is the only constitutionally permissible justification for the denial of bail. In my view, to say that the eighth amendment does not prevent Congress from defining classes of cases in which bail shall not be allowed but only provides that bail shall not be excessive in those cases where it is allowed "is a classic case of the cart pulling the horse since the Congress could abrogate the right to bail altogether, making the eighth amendment absolutely meaningless." *Edwards,* 430 A.2d at 1365 (Mack, J., dissenting). *See also Carlson v. Landon,* 342 U.S. 524, 556, 72 S.Ct. 525, 542, 96 L.Ed. 547 (1951) (Black, J., dissenting). Regardless of whether the English provision that provided the basis for the eighth amendment was more narrowly structured,[FN4] the Bill of Rights "was written and adopted to guarantee Americans greater freedom than had been enjoyed by their ancestors who had been driven from Europe by persecution." *Edwards,* 430 A.2d at 1366 (Mack, J., dissenting) (quoting *Carlson v. Landon,* 342 U.S. 524, 556, 72 S.Ct. 525, 542, 96 L.Ed. 547*reh. denied,*343 U.S. 988, 72 S.Ct. 1069, 96 L.Ed. 1375 (1952)). *See also* Foote, *The Coming Constitutional Crisis in Bail,* 113 U.Pa.L.Rev. 959, 1125 (1965).

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FN4. *See* Duker, The Right to Bail: An Historical Inquiry, 42 Alb.L.Rev. 33, 58-66 (1977) (finding that the English provision did not limit Parliament's ability to define offenses as nonbailable).

Although there have been hints to the contrary in recent Supreme Court opinions, *see* ***957***Carlson,* 342 U.S. at 545-46, 72 S.Ct. at 536-37, and *Schall* [redacted] *Martin,* 467 U.S. 253, 104 S.Ct. 2403, 2410, 81 L.Ed.2d 207 (1984), it would be a travesty if we glibly abandoned the observations of the Supreme Court in *Stack* [redacted] *Boyle,* 342 U.S. 1, 4, 72 S.Ct. 1, 3, 96 L.Ed. 1 (1951):

> From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), federal law has unequivocally provided that a person arrested for a noncapital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. *See Hudson* [redacted] *Parker,* 156 U.S. 277, 285, 15 S.Ct. 450, 453, 39 L.Ed. 424 (1895). Unless this right to bail before trial is preserved, the **presumption** of innocence, secured only after centuries of struggle, would lose its mean- ing.

Thus, in my view, the Bail Reform Act violates the eighth amendment by allowing the denial of bail on grounds unrelated to the defendant's likelihood of flight.

Even if Congress *is* free to define nonbailable offenses, certainly the allowable justifications are limited. Justice Black, sitting as a Circuit Justice, stated that "the command of the eighth amendment that 'excessive bail shall not be required * * * ' at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons." *Sellers* [redacted] *United States,* --- U.S. ----, 89 S.Ct. 36, 38, 21 L.Ed.2d 64 (1968). *See also Truong Dinh Hung* [redacted] *United States,* 439 U.S. 1326, 99 S.Ct. 16, 58 L.Ed.2d 33 [redacted], Circuit Justice 1978); *Harris* [redacted] *United States,* 404 U.S. 1232, 92 S.Ct. 10, 30 L.Ed.2d 25 (1971) (Douglas, Circuit Justice 1971). At a minimum, the eighth amendment must prohibit unreasonable denial of bail. *Carlson,* 342 U.S. at 569, 72 S.Ct. at 548 (Burton, J., dissenting). *See also Hunt* [redacted] *Roth,* 648 F.2d 1148, 1161 (8th Cir.1981), *vacated as moot in* [redacted] *Hunt,* 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) ("... Congress and the states may reasonably legislate as to the right to bail for certain offenses provided the power is exercised rationally, reasonably, and without discrimination.") Surely we cannot condone the position that bail may be denied for the primary purpose of punishing a defendant prior to the final determination of his guilt, as defined in *Evitts.*

The government has a compelling interest in safeguarding the integrity of the judicial system. Denial of bail on the ground that the defendant is likely to flee furthers this interest by ensuring the defendant's presence at trial. Certainly, from the perspective of the individual denied bail on this ground, the bars are just as cold and the cell is just as bleak as if he were being punished. Whatever penal aspects are attendant to such incarceration, however, are incidental to the achievement of the state's principle purpose-the protection of the integrity of the judicial system.

This justification is, however, inapplicable in the cases before us, since the district

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court found on a sufficient record that bail would ensure the presence of the defendants and that neither defendant is a danger to the community requiring immediate isolation. Thus, the only possible purpose for detaining them before the guilt determination is complete, as defined by *Evitts,* is punitive. While this conclusion is not difficult to divine from the face of the statute, Congress has made our analytic task even easier by explicitly stating the intent of the statutory provisions governing bail pending appeal to be punitive. The legislative history accompanying the Act indicates that Congress believed swifter punishment is a greater deterrent to criminal conduct: "release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law, especially in those situations where the appeal of the conviction may drag on for many months or even years." Senate Report No. 98-225 at 26, 98th Cong., 2d Sess. (1984), U.S.Code Cong. & Admin.News 1984, p. 3209; Senate Report No. 98-147 at 562, 98th Cong., 1st Sess. (1983); Senate Report No. 97-317 at 15-56, 97th Cong., 2d Sess. (1982). As the court noted in its memorandum ***958** opinion and order in *United States* [redacted] *Cirrincione,* 600 F.Supp. 1436, 1443 (N.D.Ill.1985):

> By viewing the restrictions on release pending appeal to be a deterrent to crime, Congress must have concluded that a sentence that commences immediately upon conviction is somehow more severe than a sentence which commences only after appeal. Certainly a sentence which commences before, rather than after, appeal, is more certain to be served.

Indeed, in the approximately ten percent of all criminal cases in which the appellate courts reverse convictions,[FN5] there is a substantial likelihood that persons will serve time in prison who would not otherwise have served at all, since some of these reversals will result in dismissals and even retrial will not necessarily result in conviction.

> FN5. Annual Report of the Director of the Administrative Office of the United States Courts, Table B-1, p. 228 (1984).

Denial of bail for the primary purpose of punishing the defendant is unreasonable, and therefore a violation of the eighth amendment. Accordingly, I can only conclude that, because under the statute as written by Congress and as rewritten by our court and others the denial of post-conviction bail is principally a punitive act, the statute is unconstitutional under the eighth amendment. In addition, the punitive nature of the statute leads me to conclude that the statute also violates the due process clause and the ex post facto clause.

THE DUE PROCESS CLAUSE

The liberty protected by the fifth amendment includes freedom from punishment. *Bell* [redacted] *Wolfish,* 441 U.S. 520, 535 n. 17, 99 S.Ct. 1861, 1871, n. 17, 60 L.Ed.2d 447 (1978). Thus, under the due process clause, a person may not be punished prior to an adjudication of guilt in accordance with due process of law. *Wolfish,* 441 U.S. at 535, 99 S.Ct. at 1871. Since a defendant is not finally adjudicated guilty until after the conclusion of his appeal, *Evitts,* 469 U.S. at ----, 105 S.Ct. 831, the prohibition against punishment is still applicable while the defendant is awaiting his appeal.

The Supreme Court "has recognized a distinction between punitive measures that

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may not constitutionally be imposed prior to a determination of guilt and regulatory measures that may." *Wolfish,* 441 U.S. at 537, 99 S.Ct. at 1873. Thus, in analyzing the denial of bail, "the court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538, 99 S.Ct. at 1873. As discussed, the legislative history makes clear that the statutory restrictions on bail pending appeal were "imposed for the purpose of punishment." *Wolfish,* 441 U.S. at 538, 99 S.Ct. at 1873. The statute thus violates the due process clause by imposing punishment prior to a final adjudication of guilt.

The infirmity of the new statute has another dimension under the due process clause as well-one which stems from the critically overburdened state of our docket. In my view, the risk of erroneous deprivation of liberty under the new provisions will be great, for I am persuaded that in practice the substance of the legal issues raised in the petitions for bail pending appeal will receive only slight consideration.

While I have been unable to make a precise calculation, such figures as are available suggest that approximately sixty-three percent of all direct criminal appeals to this circuit involve persons who have been granted bail pending appeal. Because of the Bail Reform Act, we have pending a large number of petitions to this court to grant bail pending appeal after denial by the trial court. It is quite possible that we would have little difficulty continuing to work into our calendar an examination of cases where the only test for denial of bail is frivolity. But the test that the majority imposes ensures, as night to day, that if we take our duties under Rule 9 of the Rules of Appellate Procedure seriously, we have ***959** just added a mini-appeal in a large percentage of direct criminal appeals to our already unmanageable docket. Even the majority admits that "[i]n the final analysis, we cannot define blanket categories for what will constitute 'substantial' questions under § 3143(b)(2)." Op. at p. 952. The court's self-injunction that such issues must be determined on a "case-by-case basis" is the administrative equivalent of handing a rock to a drowning man. Even in the cases in which we ultimately determine that the question is not "substantial," the effort required to give conscientious judicial scrutiny to the determination of that issue will be substantial.

Notwithstanding the fact that the trial court makes the initial determination, the substantiality of an issue of law is one that this court must determine and no **presumption** can properly be given to the trial court's predetermination of that issue. Once a question is found to be substantial, the court must also make a determination tantamount to a harmless error determination. At this point the mini-appeal is no longer a mini-appeal. We have a duty to find harmlessness only in light of the entire record. One need say no more in order to suggest the damage we have done to our dockets, and the risk that in our overburdened state the bail decisions will not be adequately reviewed. In addition, the process impinges on the fundamental fairness of the review of the merits of each criminal appeal, for our final determination on the merits will inevitably be affected by the fact that we have already found that the legal issues raised lack substantiality. By this I do not intend even remotely to impugn either the ability or intent of the judges. The problems are simply the inevitable product of the pressures of our dockets and the nature

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of the human mind.

EX POST FACTO

The ex post facto clause was adopted, in part, to protect an individual's right to fair notice when the government "increases punishment beyond what was prescribed when the crime was consummated." *Weaver [redacted] Graham,* 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17 (1981). In *Weaver* the Court noted that two elements must be present for a criminal law to be held ex post facto: it must apply to acts occurring before its enactment into law, and it must function to the disadvantage of the offender affected by it. The Supreme Court has repeatedly recognized, however, that a purely procedural change in the law is not ex post facto, even if a defendant is disadvantaged thereby. *See, e.g., Dobbert [redacted] Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), *reh. denied,*434 U.S. 882, 98 S.Ct. 246, 54 L.Ed.2d 166 (1977); *Beazell [redacted] Ohio,* 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Hopt [redacted] Utah,* 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884). In other cases, however, the Court has noted that a procedural change may so affect substantial rights as to fall within the ex post facto prohibition. *See, e.g., Kring [redacted] Missouri,* 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883); *Thompson [redacted] Utah,* 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898). I need not linger long over the body of law addressed to the fine distinctions between those procedural changes that do affect substantial rights and those that do not, however, in light of the legislative history indicating that Congress intended the provision to be punitive. As the Court noted in *Deveau [redacted] Braisted,* 363 U.S. 144, 160, 80 S.Ct. 1146, 1154, 4 L.Ed.2d 1109,*reh. denied,*364 U.S. 856, 81 S.Ct. 30, 5 L.Ed.2d 80 (1960):

> The mark of an *ex post facto* law is the imposition of what can fairly be designated as punishment for past acts. The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction comes about as a relevant incident to a regulation of a present situation....

As the court found in *Cirrincione,*"the post-conviction bail restrictions are not unrelated to punishment nor merely incidental to regulation of a present situation." 600 F.Supp. at 1443. Rather, the provisions ***960** impose on defendants what Congress viewed as the harsher punishment of a sentence that must be served immediately rather than after the conclusion of the appeal. Indeed, for those defendants whose convictions are reversed and who are not thereafter reconvicted, the statute imposes the punishment of imprisonment on those who would not otherwise be forced to bear it. To fall into the "procedure" versus "substance" trap is intolerable under the circumstances and trivializes the seriousness of incarceration. Because the provisions are principally and fundamentally penal, they are irreconcilable with the notion that a person may be punished only to the extent that the law allowed at the time he committed the crime.

PRE-TRIAL **DETENTION**

Finally, I address the issue that alarms me most of all about the court's opinion-the implications for the concept of pretrial bail inherent in the method by which the court has reached its result. I think it likely that the trivialization of premature incarceration of convicted persons prior to appeal as

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merely procedural will result in the same trivialization of premature incarceration of accused persons prior to trial. I hold with Justice Jackson who, sitting as a circuit justice, said:

> It is difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses that I am loath to resort to it, even as a discretionary judicial technique....

Williams [redacted] *United States,* 184 F.2d 280, 282-83 (2d Cir.1950). Professor Tribe has noted that this approach bears a striking similarity to the exchange in Lewis Carroll's *Through the Looking Glass:*

> The Queen observes that the King's Messenger is "in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all." Perplexed, Alice asks, "Suppose he never commits the crime?" "That will be all the better, wouldn't it?" the Queen replies.

Tribe, *An Ounce of* ***Detention****: Preventive Justice in the World of John Mitchell,* 56 Va.L.Rev. 371, 374 (1970) (quoted in *Edwards,* 430 A.2d at 1368 (Mack, J., dissenting)).

What one thinks of the role of the eighth amendment and the due process clause in restraining unjustified **detention** prior to trial or pending appeal undoubtedly depends on one's experience. From our privileged position it would be quite normal for us to assume that the spectre of unjustified **detention** looms only in such countries as Poland or South Africa. Perhaps we would be more mindful of the past failings of our own country in this regard, and more inclined to bolster the safeguards against future lapses, if we were of Japanese origins. *See Korematsu* [redacted] *United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *reh. denied,*324 U.S. 885, 65 S.Ct. 674, 89 L.Ed. 1435 (1945). Our sensitivity to the dangers of unjustified or discriminatory **detention** might be similarly heightened if we were black or poor. *See Furman* [redacted] *Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), *reh. denied,*409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972) (Douglas, J., concurring) (in which the Supreme Court chronicled our history of racial and economic disparity in the execution of accused persons).

Crime is indeed one of the most serious of the problems that threaten our society, and the goal of enhancing the security of our citizenry is an important one. We should not seek to achieve it through the circumvention of constitutional safeguards, however. To fall into the "procedure" versus "substance" trap is intolerable when human liberty hangs in the balance. To punish an individual before he has been finally adjudicated guilty or to **retroactively** enhance the punishment for a crime is a perversion of our system of justice. In the end it will not bring either credit or ***961** enhanced effectiveness to the criminal justice system.

I would grant both petitions to admit to bail pending appeal.

SEYMOUR, Circuit Judge, dissenting.

I generally agree with most of what Judge McKay has written and I therefore join his dissent. I write separately to note two things.

First, I am not convinced that likelihood of flight is the sole consideration that may be

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given to a bail decision pending appeal. I believe that circumstances could justify a denial of bail where the defendant has been convicted of a violent crime and has otherwise indicated that he is a danger to the community. Nonetheless, I fear that the language of the statute is sufficiently vague to encompass far more situations than I would consider constitutional. That is not the case here, however, and the proper contours of "likely to ... pose a danger to the safety of any other person or the community,"18 U.S.C. § 3143(b)(1), must be left to the appropriate cases.

Second, it is unfortunate that Congress has chosen to limit bail pending appeal as a reaction to the sad state of the circuit court dockets. In 1979, there were 1194 appeals filed in the Tenth Circuit; in 1984, there were 1922. Administrative Office of the United States Courts, *Federal Court Management Statistics* 11 (1984). The average time it is currently taking this circuit to handle a criminal appeal from the date of the notice to oral argument is 368 days.

In a bail opinion in 1956, Justice Frankfurter addressed the growing length of time of criminal appeals:

> "Nothing has disturbed me more during my years on the Court than the time span, in so many cases that come here, between the date of an indictment and the final appellate disposition of a conviction. Such untoward delays seem to me inimical to the fair and effective administration of the criminal law. I see no reason whatever why we in this country cannot be as expeditious in dealing with criminal appeals as is true of England. Applications for appeals are heard in the English Court of Criminal Appeal within eight weeks of conviction; in murder cases appeals 'are generally before the Court not later than three weeks after the conviction.' "

Ward [redacted] *United States,* --- U.S. ----, 76 S.Ct. 1063, 1066, 1 L.Ed.2d 25 (1956). When Justice Frankfurter expressed these concerns, the case before him had been pending on appeal for four months and he expected that it would not be heard on the merits for another two months. Given this time frame, which he viewed as far too lengthy, he said:

> "The Government should, I believe, be the active mover for an early hearing, thus putting upon the convicted defendant the responsibility for setting forth sound reasons for postponing such a hearing. I am not able to understand why it should not become the settled practice for the Government to move, after an appeal is taken from a conviction, for the hearing of the appeal on the stenographic minutes at the earliest possible moment that a Court of Appeals can accommodate its calendar to the disposition of business that has first call, namely, a criminal appeal. This is especially desirable in a case where bail has been denied."

Id. 76 S.Ct. at 1067.

I agree with Justice Frankfurter. I believe that Congress should have addressed its concern for the length of the appeal process by enacting some form of speedy appeals act rather than limiting bail. Judge McKay correctly envisions that the circuits soon will be mired in mini-appeals over the bail issues if we exercise our duty as Article III judges to review seriously the trial judge's determination that no "substantial" issue is presented. For this reason, I urge this court to expedite all criminal appeals where bail has been denied, to deny extensions of time to court reporters and brief writers, and to hear oral argument on the merits within 90

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days of conviction. If at the time of oral argument the panel determines that an issue is in fact ***962** substantial and likely to result in reversal, it can immediately order that bail be set pending the final decision on appeal. In this manner, the court can ameliorate the deprivation of liberty involved where bail has been denied to a defendant whose conviction is thereafter overturned on appeal.

C.A.10,1985.
U.S. v. Affleck
765 F.2d 944, 53 USLW 2628

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EFTA00191723

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: _____

18 U.S.C. § 371
18 U.S.C. § 1591(a)(1)
18 U.S.C. § 1591(a)(2)
18 U.S.C. § 2422(b)
18 U.S.C. § 2423(e)
18 U.S.C. § 2423(d)
18 U.S.C. § 2423(b)

UNITED STATES OF AMERICA

vs.

JEFFREY EPSTEIN,
SARAH KELLEN,
ADRIANA ROSS, a/k/a "Adriana Mucinska,"
and NADIA MARCINKOVA,

Defendants.
_____/

INDICTMENT

The Grand Jury charges that:

BACKGROUND

At all times relevant to this Indictment:

1. Defendant JEFFREY EPSTEIN employed defendants SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA to perform, among other things, services as personal assistants.

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2. Defendant JEFFREY EPSTEIN employed L.G. to perform, among other things, services as a personal assistant.

3. Defendants JEFFREY EPSTEIN and SARAH KELLEN paid T.M., H.R., and A.F. to perform, among other things, recruiting services.

4. Defendant JEFFREY EPSTEIN owned a property located at 358 El Brillo Way, Palm Beach, Florida, in the Southern District of Florida (hereinafter referred to as "358 El Brillo Way").

5. Defendant JEFFREY EPSTEIN owned a property located at 9 East 71st Street, New York, New York (hereinafter referred to as "the New York residence").

6. Defendant JEFFREY EPSTEIN was the principal owner of JEGE, INC., a Delaware corporation. JEGE, INC.'s sole business activities related to the operation and ownership of a Boeing 727-31 aircraft bearing tail number N908JE.

7. Defendant JEFFREY EPSTEIN served as president, sole director, and sole shareholder of JEGE, INC., and had the power to direct all of its operations.

8. Defendant JEFFREY EPSTEIN was the principal owner of Hyperion Air, Inc., a Delaware corporation. Hyperion Air, Inc.'s sole business activities related to the operation and ownership of a Gulfstream G-1159B aircraft bearing tail number N909JE.

9. Defendant JEFFREY EPSTEIN served as president, sole director, and sole shareholder of Hyperion Air, Inc., and had the power to direct all of its operations.

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10. Pursuant to Florida Statutes Section 794.05, a "person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree." For purposes of "this section, 'sexual activity' means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose." Florida Statutes Section 794.021 states that "ignorance of the age [of the victim] is no defense," and that neither "misrepresentation of age by [the victim] nor a bona fide belief that such person is over the specified age [shall] be a defense."

11. Pursuant to Florida Statutes Sections 800.04(5)(a) and 800.04(5)(c)(2), an adult "who intentionally touches in a lewd or lascivious manner the breasts, genitals, genital area, or buttocks, or the clothing covering them, of a person less than 16 years of age, or forces or entices a person under 16 years of age to so touch the perpetrator, commits lewd or lascivious molestation," which is a felony of the second degree if the victim is 12 years of age or older but less than 16 years of age.

12. Pursuant to Florida Statutes Sections 800.04(6)(a) and 800.04(6)(b), an adult "who [i]ntentionally touches a person under 16 years of age in a lewd or lascivious manner or [s]olicits a person under 16 years of age to commit a lewd or lascivious act commits lewd or lascivious conduct," which is a felony of the second degree.

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13. Pursuant to Florida Statutes Sections 800.04(7)(a) and 800.04(7)(c), an adult "who: (1) [i]ntentionally masturbates; (2) [i]ntentionally exposes the genitals in a lewd or lascivious manner; or (3) [i]ntentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including, but not limited to . . . the simulation of any act involving sexual activity in the presence of a victim who is less than 16 years of age, commits lewd or lascivious exhibition," which is a felony of the second degree.

14. Pursuant to Florida Statutes Section 800.04(2), "[n]either the victim's lack of chastity nor the victim's consent is a defense to the crimes proscribed by [Section 800.04]."

15. Pursuant to Florida Statutes Section 800.04(3), "[t]he perpetrator's ignorance of the victim's age, the victim's misrepresentation of his or her age, or the perpetrator's bona fide belief of the victim's age cannot be raised as a defense in a prosecution under [Section 800.04]."

16. Pursuant to Florida Statutes Section 800.02, a "person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree."

17. Defendant JEFFREY EPSTEIN was over the age of 24 and did not have any medical license.

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18. During the period of her involvement with the Defendants, Jane Doe #4 attended Wellington High School and Palm Beach Central High School in Palm Beach County.

19. During the period of her involvement with the Defendants, Jane Doe #5 attended Wellington High School in Palm Beach County.

20. During the period of their involvement with the Defendants, Jane Does # 6, 8 and 12 attended Palm Beach Central High School in Palm Beach County.

21. During the period of her involvement with the Defendants, Jane Doe #7 attended William T. Dwyer High School in Palm Beach County.

22. During the periods of their involvement with the Defendants, Jane Does # 9, 14, 15, 16, 17, 18, and 19 attended Royal Palm Beach High School in Palm Beach County.

23. During the period of her involvement with the Defendants, Jane Doe #10 attended Lake Worth High School in Palm Beach County.

24. During the period of her involvement with the Defendants, Jane Doe #11 attended the Professional Performing Arts School, a public high school, located in New York, New York.

25. During the period of her involvement with the Defendants, Jane Doe #13 attended John I. Leonard High School in Palm Beach County.

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COUNT 1
(Conspiracy: 18 U.S.C. § 371)

26. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

27. From at least as early as 2001, the exact date being unknown to the Grand Jury, through in or around October 2005, in Palm Beach County, in the Southern District of Florida, and elsewhere, the Defendants,

JEFFREY EPSTEIN,
SARAH KELLEN,
ADRIANA ROSS, a/k/a "Adriana Mucinska,"
and
NADIA MARCINKOVA,

did knowingly and willfully combine, conspire, confederate and agree with each other and with others known and unknown to commit an offense against the United States, that is, to use a facility or means of interstate or foreign commerce to knowingly persuade, induce, and entice individuals who had not attained the age of 18 years to engage in prostitution, in violation of Title 18, United States Code, Section 2422(b).

Purpose and Object of the Conspiracy

28. It was the purpose and object of the conspiracy to procure females under the age of 18 to travel to 358 El Brillo Way and the New York residence so that JEFFREY EPSTEIN could, in exchange for money, engage in lewd conduct with those minor females in order to satisfy JEFFREY EPSTEIN's prurient interests.

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Manner and Means

29. The manner and means by which the Defendants and other participants sought to accomplish the purpose and object of the conspiracy included the following:

(a) It was part of the conspiracy that Defendants SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," NADIA MARCINKOVA, and other participants would contact minor females via the use of cellular and other telephones to arrange appointments for minor females to travel to 358 El Brillo Way and the New York residence to allow Defendant JEFFREY EPSTEIN to engage in lewd conduct with them.

(b) It was further a part of the conspiracy that Defendants JEFFREY EPSTEIN, SARAH KELLEN, and ADRIANA ROSS, a/k/a "Adriana Mucinska," NADIA MARCINKOVA, and other participants would make payments to, or cause payments to be made to, minor females in exchange for engaging in lewd conduct.

(c) It was further a part of the conspiracy that Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and other participants would ask females to recruit other minor females to engage in lewd conduct with Defendant JEFFREY EPSTEIN.

(d) It was further a part of the conspiracy that Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and other participants would make payments to, or cause payments to be made to, the recruiters for

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bringing additional minor females to 358 El Brillo Way and the New York residence to engage in lewd conduct with Defendant JEFFREY EPSTEIN.

(e) It was further a part of the conspiracy that Defendant JEFFREY EPSTEIN would pay minor females to engage in lewd conduct with Defendant NADIA MARCINKOVA to satisfy Defendant JEFFREY EPSTEIN's prurient interests.

Overt Acts

30. In furtherance of this conspiracy and to effect the objects thereof, there was committed by at least one of the co-conspirators herein, at least one of the following overt acts, among others, in the Southern District of Florida, and elsewhere:

Jane Does #1 and #2

(1) In or around the beginning of 2001, Defendant JEFFREY EPSTEIN engaged in sexual activity with Jane Doe #1, who was then a seventeen-year-old girl, in the presence of Jane Doe #2, who was then a fourteen-year-old girl.

(2) In or around 2001, Defendant SARAH KELLEN led Jane Doe #2 from the kitchen of 358 El Brillo Way upstairs to Defendant JEFFREY EPSTEIN's bedroom at 358 El Brillo Way.

(3) In or around 2001, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #2, who was then a fourteen-year-old girl.

(4) In or around 2001, Defendant JEFFREY EPSTEIN asked Jane Doe #2, who was then fourteen years' old, to pinch his nipples while he masturbated.

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(5) In or around 2001, Defendant JEFFREY EPSTEIN made a payment of $300 to Jane Doe #2.

(6) In or around 2001, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #2 to make an appointment for Jane Doe #2 to travel to 358 El Brillo Way.

(7) In or around 2001, JEFFREY EPSTEIN engaged in sexual intercourse with an unidentified female in the presence of Jane Doe #2, who was then a fourteen-year-old girl.

(8) In or around 2001, Defendant JEFFREY EPSTEIN paid $300 to Jane Doe #2, who was then a fourteen-year-old girl, for allowing an unidentified female to perform oral sex on Jane Doe #2 in EPSTEIN's presence.

(9) On or about March 11, 2003, an employee of Defendant JEFFREY EPSTEIN prepared a written telephone message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from Jane Doe #2.

(10) In or around 2003, Defendant JEFFREY EPSTEIN asked Jane Doe #2 if she had any younger friends who would be interested in engaging in similar activities with him.

(11) In or around 2003, Defendant SARAH KELLEN took nude photographs of Jane Doe #2, who was then a sixteen-year-old girl.

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(12) In or around 2003, Defendant SARAH KELLEN made a payment of $500 to Jane Doe #2 in exchange for posing for nude photographs.

(13) In or around 2003, Defendant SARAH KELLEN told Jane Doe #2 that Defendant JEFFREY EPSTEIN had asked KELLEN to take nude photographs of Jane Doe #2.

(14) In or around 2003, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #2, who was then a sixteen-year-old girl.

(15) In or around 2003, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #2, who was then a sixteen-year-old girl.

(16) In or around 2003, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #2 to make an appointment for Jane Doe #2 to travel to 358 El Brillo Way.

(17) On or about April 23, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #2.

(18) On or about May 2, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #2.

Jane Doe #3

(19) In or around 2003, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #3, who was then a fifteen-year-old girl.

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(20) In or around 2003, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #3.

(21) On or about October 26, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #3.

(22) On or about October 30, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #3.

(23) In or around 2004, Defendant JEFFREY EPSTEIN directed Jane Doe #3, who was then a sixteen- or seventeen-year-old girl, to straddle an adult female and to touch the adult female's breasts.

(24) In or around 2004, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of an adult female in the presence of Jane Doe #3, who was then a sixteen- or seventeen-year-old girl.

(25) In or around 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #3.

(26) In or around 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #3 to rub his nipples.

(27) In or around 2004, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of Jane Doe #3, who was then a sixteen- or seventeen-year-old girl.

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(28) In or around 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #3 to recruit additional females to come to 358 El Brillo Way.

(29) On or about November 8, 2004, one of Defendant JEFFREY EPSTEIN's employees prepared a written telephone message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from Jane Doe #3 that read: "I have a female for him."

(30) On or about January 14, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #3.

(31) On or about January 29, 2005, one of Defendant JEFFREY EPSTEIN's employees prepared a written telephone message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from Jane Doe #3 that read: "I have a female for him."

Jane Does #4, #5, and #6

(32) In or around the first half of 2004, Defendant SARAH KELLEN led Jane Doe #4 and Jane Doe #5 to Defendant JEFFREY EPSTEIN's bedroom at 358 El Brillo Way.

(33) In or around the first half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #4 about her age, and Jane Doe #4 responded with her true age.

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(34) In or around the first half of 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #4, who was then a seventeen-year-old-girl, and Jane Doe #5, who was then a seventeen-year-old girl.

(35) In or around the first half of 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #4, who was then a seventeen-year-old girl, to play with his nipples.

(36) In or around the first half of 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #4, who was then a seventeen-year-old girl, to remove her clothing.

(37) In or around the first half of 2004, Defendant JEFFREY EPSTEIN stroked the vagina of Jane Doe #4, who was then a seventeen-year-old girl.

(38) In or around the first half of 2004, Defendant JEFFREY EPSTEIN paid $200 to Jane Doe #4.

(39) In or around the first half of 2004, Defendant JEFFREY EPSTEIN paid $200 to Jane Doe #5.

(40) In or around the first half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #6 what high school she attended.

(41) In or around the first half of 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #4 to leave so that Jane Doe #6 could massage him alone.

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(42) In or around the first half of 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #6, who was then a sixteen-year-old girl.

(43) In or around the first half of 2004, Defendant JEFFREY EPSTEIN digitally penetrated Jane Doe #6, who was then a sixteen-year-old girl.

(44) In or around the first half of 2004, Defendant JEFFREY EPSTEIN placed a large vibrating massager on the vagina of Jane Doe #6, who was then a sixteen-year-old girl.

(45) In or around the first half of 2004, Defendant JEFFREY EPSTEIN caused a payment of $200 to be paid to Jane Doe #6.

Jane Does #7 and #8

(46) In or around July 2004, Defendant JEFFREY EPSTEIN led T.M., who was then a fifteen-year-old girl, and Jane Doe #7, who was then a sixteen-years-old girl, from the kitchen of 358 El Brillo Way upstairs to Defendant JEFFREY EPSTEIN's bedroom at 358 El Brillo Way.

(47) On or about July 4, 2004, Defendant SARAH KELLEN made one or more telephone calls to a telephone used by Jane Doe #7.

(48) On or about July 5, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by T.M.

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(49) In or around July 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #8, who was then a seventeen-year-old girl.

(50) In or around July 2004, Defendant JEFFREY EPSTEIN stroked the vagina of Jane Doe #8, who was then a seventeen-year-old girl.

(51) In or around July 2004, Defendant JEFFREY EPSTEIN paid approximately $200 to Jane Doe #8.

(52) In or around July 2004, Defendant JEFFREY EPSTEIN paid $200 to T.M. for recruiting Jane Doe #8 to travel to 358 El Brillo Way.

(53) In or around July 2004, Defendant SARAH KELLEN told Jane Doe #8 that Defendant JEFFREY EPSTEIN would pay Jane Doe #8 if she returned with a friend.

(54) On or about July 15, 2004, Defendant SARAH KELLEN placed one or more telephone calls to a telephone used by Jane Doe #7.

(55) On or about July 15, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #8.

(56) On or about July 15, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by T.M.

(57) On or about July 16, 2004, Defendant SARAH KELLEN placed one or more telephone calls to a telephone used by Jane Doe #7.

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(58) On or about July 16, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by T.M.

(59) On or about July 17, 2004, one of Defendant JEFFREY EPSTEIN's employees prepared a written telephone message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from T.M. that read: "Me & [Jane Doe #7] can come tomorrow any time or [T.M.] alone".

(60) In or around July 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #7, who was then a sixteen-year-old girl.

(61) In or around July 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #7, who was then a sixteen-year-old girl, to rub his nipples.

(62) In or around July 2004, Defendant JEFFREY EPSTEIN stroked the vagina of Jane Doe #7, who was then a sixteen-year-old girl.

(63) In or around July 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #7.

(64) In or around July 2004, Defendant JEFFREY EPSTEIN told Jane Doe #7 that if she reported to anyone what had occurred at Defendant JEFFREY EPSTEIN's home, bad things could happen to her.

(65) On or about July 24, 2004, Defendant SARAH KELLEN placed ~~to~~ a telephone call to a telephone used by Jane Doe #8.

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Jane Does #9 and #10

(66) On or about July 15, 2004, Defendant SARAH KELLEN placed one or more telephone calls to a telephone used by Jane Doe #9.

(67) On or about July 16, 2004, Defendant SARAH KELLEN caused Jane Doe #9 to make one or more telephone calls to a telephone used by Jane Doe #10.

(68) On or about July 17, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #9.

(69) On or about July 18, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #9.

(70) On or about July 22, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #9.

(71) In or around July 2004, Defendant JEFFREY EPSTEIN fondled the breasts of Jane Doe #9, who was then a seventeen-year-old girl.

(72) In or around July 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #9, who was then a seventeen-year-old girl.

(73) In or around July 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #9.

(74) On or about July 22, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #10.

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(75) In or around the last half of 2004, Defendants JEFFREY EPSTEIN and NADIA MARCINKOVA engaged in oral sex and sexual intercourse in the presence of Jane Doe #9, who was then a seventeen-year-old girl.

(76) In or around the last half of 2004, Defendant JEFFREY EPSTEIN forcibly inserted his penis into the vagina of Jane Doe #9, who was then a seventeen-year-old girl.

(77) In or around the last half of 2004, Defendant JEFFREY EPSTEIN made a payment of $300 to Jane Doe #9.

(78) In or around the last half of 2004, Defendant JEFFREY EPSTEIN rubbed the vagina of Jane Doe #10, who was then a seventeen-year-old girl.

(79) In or around the last half of 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #10.

(80) On or about November 28, 2004, Defendant JEFFREY EPSTEIN arranged for one of his employees to provide an envelope filled with cash to Jane Doe #9.

(81) On or about December 4, 2004, Defendant SARAH KELLEN provided a written message to Defendant JEFFREY EPSTEIN regarding Jane Does # 9 and 10, stating: "[Jane Doe #10] would like to work @ 4:00 pm if possible. [[Jane Doe #9] is scheduled for 5:00 today.] the movie is @ 7:30".

(82) On or about December 29, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #9.

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(83) On or about December 30, 2004, Defendants JEFFREY EPSTEIN and SARAH KELLEN caused the purchase of Broadway tickets as an eighteenth birthday gift for Jane Doe #9.

(84) In or around the last half of 2004 or January 2005, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #10, who was then a seventeen-year-old girl.

(85) In or around the last half of 2004 or January 2005, Defendant JEFFREY EPSTEIN fondled the breasts of Jane Doe #10, who was then a seventeen-year-old girl.

(86) On or about January 14, 2005, Defendant SARAH KELLEN placed one or more telephone calls to a telephone used by Jane Doe #10.

(87) On or about January 27, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed one or more telephone calls to a telephone used by Jane Doe #10.

(88) On or about January 28, 2005, Defendant SARAH KELLEN placed one or more telephone calls to a telephone used by Jane Doe #10.

(89) On or about February 1, 2005, Defendant NADIA MARCINKOVA placed one or more telephone calls to a telephone used by Jane Doe #10.

(90) In or around February 2005, Defendant JEFFREY EPSTEIN caused a payment of $200 to be made to Jane Doe #9 for recruiting Jane Doe #16 to travel to 358 El Brillo Way.

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Jane Doe #11

(91) In or around 2004, Defendant JEFFREY EPSTEIN told Jane Doe #11 that he would pay her to find and bring him more girls.

(92) In or around 2004, Defendant JEFFREY EPSTEIN paid $200 to Jane Doe #11 for recruiting a minor female to travel to his New York home.

(93) In or around 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #11 when she would be getting more girls.

(94) On or about April 5, 2005, one of Defendant JEFFREY EPSTEIN's employees prepared a written message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from Jane Doe #11 that read: "Re does she have any new friends you can meet – I was away over the weekend so I have not spoken to anyone new. But, [unidentified Jane Doe] will be around later today and I know she really wants to work. The others should be back around Thursday. Let me know about [unidentified Jane Doe]."

(95) On or about June 22, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #11.

Jane Does #12 and #13

(96) On or about August 2, 2004, an employee of Defendant JEFFREY EPSTEIN prepared a written telephone message for Defendant JEFFREY EPSTEIN's review regarding a telephone call received from T.M. and Jane Doe #12 that stated: "They are available all weekend and maybe [Jane Doe #13] too".

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(97) On or about August 21, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #13.

(98) In or around the last half of 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #12, who was then a seventeen-year-old girl.

(99) In or around the last half of 2004, Defendant JEFFREY EPSTEIN digitally penetrated Jane Doe #12, who was then a seventeen-year-old girl.

(100) In or around the last half of 2004, Defendant JEFFREY EPSTEIN attempted to place a massaging device on the vagina of Jane Doe #12, who was then a seventeen-year-old girl.

(101) In or around the last half of 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #12.

(102) In or around the last half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #12, who was then a seventeen-year-old girl, about her age.

(103) In or around the last half of 2004, Defendant JEFFREY EPSTEIN told Jane Doe #12 that he would take her to Los Angeles when she turned eighteen.

(104) In or around the last half of 2004, Defendants JEFFREY EPSTEIN and SARAH KELLEN caused Jane Doe #12 to recruit Jane Doe #13 to travel to 358 El Brillo Way.

(105) In or around the last half of 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #13, who was then a seventeen-year-old girl.

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(106) In or around the end of 2004, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of Jane Doe #13, who was then a seventeen-year-old girl.

(107) In or around the last half of 2004, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #13.

(108) In or around the last half of 2004, Defendant JEFFREY EPSTEIN digitally penetrated Jane Doe #13, who was then a seventeen-year-old girl.

(109) In or around the last half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #13, who was then a seventeen-year-old girl, about her age.

(110) In or around the last half of 2004, Defendant JEFFREY EPSTEIN told Jane Doe #13 that he wanted to take her to Paris but he could not because Jane Doe #13 was not yet eighteen years old.

(111) In or around the last half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #13 to bring her friends to his home, especially "girls who looked like [Jane Doe #13]."

Jane Doe #14

(112) In or around the last half of 2004, Defendant SARAH KELLEN led Jane Doe #14 from the kitchen of 358 El Brillo Way upstairs to Defendant JEFFREY EPSTEIN's bedroom at 358 El Brillo Way.

(113) In or around the last half of 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #14 to provide her telephone number.

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(114) In or around the last half of 2004, Defendant JEFFREY EPSTEIN instructed Jane Doe #14, who was then a seventeen-year-old girl, to pinch his nipples.

(115) In or around the last half of 2004, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #14, who was then a seventeen-year old girl.

(116) In or around the last half of 2004, Defendant JEFFREY EPSTEIN made a payment of $300 to Jane Doe #14.

(117) In or around the end of 2004 and the beginning of 2005, Defendant JEFFREY EPSTEIN digitally penetrated Jane Doe #14, who was then a seventeen-year-old girl.

(118) In or around the end of 2004 and the beginning of 2005, Defendant JEFFREY EPSTEIN asked Jane Doe #14, who was then a seventeen-year-old girl, whether she had any plans for her eighteenth birthday and acknowledged that she had not yet turned eighteen.

(119) On or about December 23, 2004, Defendant JEFFREY EPSTEIN caused a Western Union wire transfer order to be sent to Jane Doe #14.

(120) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of Jane Doe #14, who was then a seventeen-year-old girl.

(121) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN engaged in sexual intercourse with Jane Doe #14, who was then a seventeen-year-old girl.

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(122) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN performed oral sex on Jane Doe #14, who was then a seventeen-year-old girl.

(123) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN made a payment of $600 to Jane Doe #14.

(124) On or about January 8, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #14.

(125) On or about January 9, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #14.

(126) On or about January 26, 2005, one of Defendant JEFFREY EPSTEIN's employees prepared a written telephone message for Defendant ADRIANA ROSS's review regarding a call received from Jane Doe #14 that read: "She is confirming for 5:30".

(127) On or about January 26, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #14.

(128) On or about February 1, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #14.

(129) On or about March 1, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #14.

(130) On or about March 21, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone calls to a telephone used by Jane Doe #14.

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(131) On or about March 29, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #14.

Jane Doe #15

(132) On or about December 6, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(133) On or about December 14, 2004, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(134) In or around the first half of 2005, Defendant SARAH KELLEN led Jane Doe #15 from the kitchen of 358 El Brillo Way upstairs to Defendant JEFFREY EPSTEIN's bedroom at 358 El Brillo Way.

(135) In or around the first half of 2005, Defendant JEFFREY EPSTEIN instructed Jane Doe #15, who was then a seventeen-year-old girl, to pinch his nipples while he masturbated.

(136) In or around the first half of 2005, Defendant JEFFREY EPSTEIN fondled the breasts of Jane Doe #15.

(137) In or around the first half of 2005, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #15.

(138) On or about January 7, 2005, Defendant ADRIANA ROSS, a/k/a "ADRIANA MUCINSKA," placed a telephone call to a telephone used by Jane Doe #15.

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(139) On or about February 4, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(140) On or about February 10, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(141) On or about February 21, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(142) On or about February 24, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(143) On or about March 17, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(144) On or about March 30, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(145) On or about March 31, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #15.

(146) On or about March 31, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #15.

(147) On or about April 1, 2005, one of Defendant JEFFREY EPSTEIN's employees prepared a note for Defendant JEFFREY EPSTEIN's review that read: "10:30 [Jane Doe #15]/[Jane Doe #10] on Fri around 2'Oclock".

(148) In or around June 2005, Defendant JEFFREY EPSTEIN provided Jane Doe #15 with a gift of [redacted] Secret lingerie for her eighteenth birthday.

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Jane Does #16 & #17

(149) In or around February 2005, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #16, who was then a seventeen-year-old girl.

(150) In or around the first quarter of 2005, Defendants JEFFREY EPSTEIN and SARAH KELLEN caused Jane Doe #16 to place a telephone call to Jane Doe #17 to ask her to travel to 358 El Brillo Way.

(151) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN caused a payment to be made to Jane Doe #16 for recruiting Jane Doe #17 to travel to 358 El Brillo Way.

(152) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #17, who was then a sixteen-year-old girl.

(153) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN instructed Jane Doe #17, who was then a sixteen-year-old girl, to remove all of her clothing.

(154) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of Jane Doe #17, who was then a sixteen-year-old girl.

(155) In or around the first quarter of 2005, Defendant JEFFREY EPSTEIN made a payment of $200 to Jane Doe #17, who was then a sixteen-year-old girl.

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(156) In or around the first nine months of 2005, Defendant JEFFREY EPSTEIN placed a massaging device on the vagina of Jane Doe #16, who was then a seventeen-year-old girl.

(157) In or around the first nine months of 2005, Defendant JEFFREY EPSTEIN asked Jane Doe #16, who was then a seventeen-year-old girl, how old she was, and she responded that she was seventeen years old.

(158) In or around the first nine months of 2005, Defendant JEFFREY EPSTEIN engaged in sexual activity with Defendant NADIA MARCINKOVA in the presence of Jane Doe #16, who was then a seventeen-year-old girl.

(159) In or around the first nine months of 2005, Defendant JEFFREY EPSTEIN asked Jane Doe #16, who was then a seventeen-year-old girl, to touch the breast of Defendant NADIA MARCINKOVA.

(160) On or about April 11, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #16.

(161) On or about April 11, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(162) On or about April 11, 2005, Defendant SARAH KELLEN left a message for Defendant JEFFREY EPSTEIN stating: "[Jane Doe #16] can work tomorrow at 4pm."

(163) On or about May 19, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

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(164) On or about June 30, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(165) On or about July 2, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(166) On or about July 22, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(167) On or about August 18, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(168) On or about August 19, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #16.

(169) On or about August 21, 2005, Defendant NADIA MARCINKOVA placed a telephone call to a telephone used by Jane Doe #16.

(170) On or about September 3, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #16.

(171) On or about September 18, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(172) On or about September 19, 2005, Defendant SARAH KELLEN sent a text message to a telephone used by Jane Doe #16.

(173) On or about September 29, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

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(174) On or about September 30, 2005, Defendant ADRIANA ROSS, a/k/a "Adriana Mucinska," placed a telephone call to a telephone used by Jane Doe #16.

(175) On or about October 1, 2005, Defendant SARAH KELLEN left a telephone message for Defendant JEFFREY EPSTEIN stating: "[Jane Doe #15] confirmed at 11 AM and [Jane Doe #16] – 4PM".

(176) On or about October 2, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(177) On or about October 3, 2005, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #16.

(178) On or about October 3, 2005, Defendant SARAH KELLEN left a telephone message for Defendant JEFFREY EPSTEIN stating: "[Jane Doe #16] will be ½ hour late".

(179) In or around the first week of October, 2005, Defendant JEFFREY EPSTEIN engaged in sexual intercourse with Jane Doe #16, who was then a seventeen-year-old girl.

(180) In or around the first week of October, 2005, Defendant JEFFREY EPSTEIN made a payment of $350.00 to Jane Doe #16, who was then a seventeen-year-old girl.

(181) In or around the first week of October, 2005, Defendant JEFFREY EPSTEIN provided a gift of [redacted] Secret lingerie to Jane Doe #16 for her eighteenth birthday.

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Jane Does #18 and #19

(182) In or around the last half of 2003, Jane Doe #18 was approached by A.F. and was asked whether she would be willing to provide a massage to Defendant JEFFREY EPSTEIN in exchange for $200.

(183) In or around the last half of 2003, Defendant JEFFREY EPSTEIN asked Jane Doe #18 to provide her telephone number.

(184) On or around August 27, 2003, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #18.

(185) In or around the last half of 2003, Defendant JEFFREY EPSTEIN masturbated in the presence of Jane Doe #18, who was then a seventeen-year-old-girl.

(186) On or around November 16, 2003, Defendant SARAH KELLEN placed a telephone call to a telephone used by Jane Doe #18.

(187) In or around the last half of 2003, Defendant JEFFREY EPSTEIN digitally penetrated Jane Doe #18, who was then a seventeen-year-old-girl.

(188) In or around the last half of 2003, Defendant JEFFREY EPSTEIN asked Jane Doe #18 to recruit other females to travel to 358 El Brillo Way.

(189) On or about March 5, 2004, Defendant JEFFREY EPSTEIN asked Jane Doe #19, who was then a seventeen-year-old girl, to leave when she refused to remove her shirt.

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(190) On or about March 5, 2004, Defendant JEFFREY EPSTEIN verbally reprimanded Jane Doe #18 for bringing Jane Doe #19 to 358 El Brillo Way when she was not willing to undress for him.

The Defendants' Travel

(191) On or about March 11, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Teterboro, New Jersey, to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(192) On or about May 1, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from New York, New York to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(193) On or about May 14, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Canada to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(194) On or about June 11, 2004, Defendants JEFFREY EPSTEIN and SARAH KELLEN traveled from Chicago, Illinois to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(195) On or about June 20, 2004, Defendants JEFFREY EPSTEIN and NADIA MARCINKOVA traveled from the U.S. Virgin Islands to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

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(196) On or about July 4, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Aspen, Colorado to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(197) On or about July 16, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(198) On or about July 22, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from the U.S. Virgin Islands to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(199) On or about August 19, 2004, Defendants JEFFREY EPSTEIN and NADIA MARCINKOVA traveled from Van Nuys, California to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(200) On or about August 25, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Ecuador to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(201) On or about October 2, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from the U.S. Virgin Islands to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

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(202) On or about October 29, 2004, Defendants JEFFREY EPSTEIN and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(203) On or about November 10, 2004, Defendants JEFFREY EPSTEIN and SARAH KELLEN traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(204) On or about November 18, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(205) On or about December 3, 2004, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and ADRIANA ROSS, a/k/a "Adriana Mucinska," traveled from New York, New York to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(206) On or about December 13, 2004, Defendant JEFFREY EPSTEIN traveled from the U.S. Virgin Islands to Palm Beach County, Florida, aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(207) On or about December 17, 2004, Defendants JEFFREY EPSTEIN and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

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(208) On or about January 1, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Anguilla, British West Indies to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(209) On or about January 6, 2005, Defendant JEFFREY EPSTEIN traveled from Teterboro, New Jersey to Palm Beach County, Florida, aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(210) On or about January 14, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from the U.S. Virgin Islands to Palm Beach County, Florida, aboard the Boeing 727 aircraft owned by JEGE, INC.

(211) On or about January 19, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from New York, New York to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

([redacted]) On or about February 3, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Columbus, Ohio, to Palm Beach County, Florida, aboard the Boeing 727 aircraft owned by JEGE, INC.

(213) On or about February 10, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA

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MARCINKOVA traveled from New York, New York to Palm Beach County, Florida, aboard the Boeing 727 aircraft owned by JEGE, INC.

(214) On or about February 21, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from the U.S. Virgin Islands to Palm Beach County, Florida, aboard the Boeing 727 aircraft owned by JEGE, INC.

(215) On or about February 24, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida, aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(216) On or about March 4, 2005, Defendants JEFFREY EPSTEIN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from New York, New York to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(217) On or about March 18, 2005, Defendant JEFFREY EPSTEIN traveled from New York, New York to Palm Beach County, Florida aboard the Boeing 727 aircraft owned by JEGE, INC.

(218) On or about March 31, 2005, Defendant JEFFREY EPSTEIN traveled from New York, New York to Palm Beach County, Florida, aboard the Boeing 727 aircraft owned by JEGE, INC.

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(219) On or about May 19, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and ADRIANA ROSS, a/k/a "Adriana Mucinska," traveled from Teterboro, New Jersey to Palm Beach County, Florida, aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(220) On or about June 30, 2005, Defendants JEFFREY EPSTEIN and SARAH KELLEN traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(221) On or about July 22, 2005, Defendants JEFFREY EPSTEIN and SARAH KELLEN traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(222) On or about August 18, 2005, Defendants JEFFREY EPSTEIN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(223) On or about September 3, 2005, Defendants JEFFREY EPSTEIN and ADRIANA ROSS, a/k/a "Adriana Mucinska," traveled from the U.S. Virgin Islands to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(224) On or about September 18, 2005, Defendants JEFFREY EPSTEIN, SARAH KELLEN, and ADRIANA ROSS, a/k/a "Adriana Mucinska," traveled from

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Westchester County, New York to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

(225) On or about September 29, 2005, Defendants JEFFREY EPSTEIN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA traveled from Teterboro, New Jersey to Palm Beach County, Florida aboard the Gulfstream aircraft owned by Hyperion Air, Inc.

All in violation of Title 18, United States Code, Section 371.

COUNTS 2 THROUGH 10
(Sex Trafficking: 18 U.S.C. § 1591(a)(1))

31. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

32. On or about the dates enumerated as to each count listed below, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the Defendants listed below did knowingly, in and affecting interstate and foreign commerce, recruit, entice, provide, and obtain by any means a person, that is, the person in each count listed below, knowing that the person had not attained the age of 18 years and would be caused to engage in a commercial sex act as defined in 18 U.S.C. § 1591(c)(1):

Count	Date(s)	Minor Involved	Defendant(s)
2	2001 - 2004	Jane Doe #2	JEFFREY EPSTEIN SARAH KELLEN

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Count	Date(s)	Minor Involved	Defendant(s)
3	January 2004 through July 2004	Jane Doe #4	JEFFREY EPSTEIN SARAH KELLEN
4	July 2004 through December 29, 2004	Jane Doe #9	JEFFREY EPSTEIN SARAH KELLEN
5	July 2004 through January 31, 2005	Jane Doe #10	JEFFREY EPSTEIN SARAH KELLEN
6	Mid-2004 through April 22, 2005	Jane Doe #12	JEFFREY EPSTEIN SARAH KELLEN
7	August 2004 through May 27, 2005	Jane Doe #13	JEFFREY EPSTEIN SARAH KELLEN
8	November 2004 through March 2005	Jane Doe #14	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS
9	December 2004 through June 5, 2005	Jane Doe #15	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS, a/k/a "Adriana Mucinska"
10	February 2005 through first week of October 2005	Jane Doe #16	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS, a/k/a "Adriana Mucinska" NADIA MARCINKOVA

All in violation of Title 18, United States Code, Sections 1591(a)(1) and 2.

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COUNT 11
(Sex Trafficking: 18 U.S.C. § 1591(a)(2))

33. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

34. From at least as early as in or about 2001 through in or about October 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

SARAH KELLEN,
ADRIANA ROSS, a/k/a "Adriana Mucinska,"
and
NADIA MARCINKOVA,

did knowingly benefit, financially or by receiving anything of value, from participation in a venture, as defined in 18 U.S.C. § 1591(c)(3), which had engaged in an act described in violation of 18 U.S.C. § 1591(a)(1), that is, the recruiting, enticing, providing, and obtaining by any means a person, in or affecting interstate commerce, knowing that the person or persons had not attained the age of 18 years and would be caused to engage in a commercial sex act as defined in 18 U.S.C. § 1591(c)(1); in violation of Title 18, United States Code, Sections 1591(a)(2), 1591(b)(2), and 2.

COUNT 12
(Enticement of a Minor: 18 U.S.C. § 2422(b))

35. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

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36. From in or around the spring of 2003 through on or about October 2, 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #3, who was a person who had not attained the age of 18 years, to engage in prostitution and in a sexual activity for which a person can be charged with a criminal offense, that is violations of Florida Statutes Sections 800.04(5)(a), 800.04(6)(a), and 800.04(7)(a); in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 13
(Enticement of a Minor: 18 U.S.C. § 2422(b))

37. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

38. ~~From~~ in or around ~~January 2004 through in or around~~ July 2004, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

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did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #4, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 14
(Enticement of a Minor: 18 U.S.C. § 2422(b))

39. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

40. In or around July 2004, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #7, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 15
(Enticement of a Minor: 18 U.S.C. § 2422(b))

41. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

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42. From in or around July 2004 through on or around December 29, 2004, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #9, who was a person who had not attained the age of 18 years, to engage in prostitution and in a sexual activity for which a person can be charged with a criminal offense, that is a violation of Florida Statutes Section 794.05; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 16
(Enticement of a Minor: 18 U.S.C. § 2422(b))

43. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

44. From in or around July 2004 through on or about January 31, 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #10, who was a person who had not attained the age

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of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 17
(Enticement of a Minor: 18 U.S.C. § 2422(b))

45. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

46. From in or around the middle of 2004 through on or about April 22, 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #12, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 18
(Enticement of a Minor: 18 U.S.C. § 2422(b))

47. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

48. From in or around August 2004 through on or about May 27, 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

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JEFFREY EPSTEIN
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #13, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 19
(Enticement of a Minor: 18 U.S.C. § 2422(b))

49. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

50. From in or around November 2004 through in or around March 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN,
~~and~~
SARAH KELLEN,
and
ADRIANA ROSS,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #14, who was a person who had not attained the age of 18 years, to engage in prostitution and in a sexual activity for which a person can be charged with a criminal offense, that is a violation of Florida Statutes Section 794.05; in violation of Title 18, United States Code, Sections 2422(b) and 2.

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COUNT 20
(Enticement of a Minor: 18 U.S.C. § 2422(b))

51. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

52. From in or around December 2004 through on or about June 5, 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN,
SARAH KELLEN, and
ADRIANA ROSS, a/k/a "Adriana Mucinska,"

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #15, who was a person who had not attained the age of 18 years, to engage in prostitution, in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 21
(Enticement of a Minor: 18 U.S.C. § 2422(b))

53. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

54. From in or around February 2005 through in or around the first week of October 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

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JEFFREY EPSTEIN,
SARAH KELLEN,
ADRIANA ROSS, a/k/a "Adriana Mucinska,"
and NADIA MARCINKOVA,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce or entice Jane Doe #16, who was a person who had not attained the age of 18 years, to engage in prostitution and in a sexual activity for which a person can be charged with a criminal offense, that is a violation of Florida Statutes Section 794.05; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 22
(Enticement of a Minor: 18 U.S.C. § 2422(b))

55. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

56. From in or around February 2005 through in or around April 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN,
SARAH KELLEN, and
ADRIANA ROSS, a/k/a "Adriana Mucinska,"

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #17, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

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COUNT 23
(Enticement of a Minor: 18 U.S.C. § 2422(b))

57. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

58. From in or around August 2003 through in or around February 2004, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JEFFREY EPSTEIN,
and
SARAH KELLEN,

did use a facility or means of interstate commerce, that is, the telephone, to knowingly persuade, induce and entice Jane Doe #18, who was a person who had not attained the age of 18 years, to engage in prostitution; in violation of Title 18, United States Code, Sections 2422(b) and 2.

COUNT 24
(Conspiracy to Travel: 18 U.S.C. § 2423(e))

59. Paragraphs 1 through 25 of this indictment are re-alleged and incorporated by reference as fully set for the herein.

60. From at least as early as 2001 through in or around October 2005, the exact dates being unknown to the Grand Jury, the Defendants,

JEFFREY EPSTEIN,
SARAH KELLEN,
ADRIANA ROSS, a/k/a "Adriana Mucinska,"
and
NADIA MARCINKOVA,

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did knowingly and willfully conspire with each other and with others known and unknown to travel in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f), with another person, in violation of Title 18, United States Code, Section 2423(b); all in violation of Title 18, United States Code, Section 2423(e).

COUNT 25
(Facilitation of Unlawful Travel of Another: 18 U.S.C. § 2423(d))

61. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

62. From at least as early as in or about 2001 through in or around October 2005, the exact dates being unknown to the Grand Jury, in Palm Beach County, in the Southern District of Florida, and elsewhere, the Defendant,

~~SARAH KELLEN,~~

did, for the purpose of commercial advantage or private financial gain, arrange and facilitate the travel of a person, that is Defendant Jeffrey Epstein, knowing that such person was traveling in interstate commerce for the purpose of engaging in illicit sexual conduct, as defined in 18 U.S.C. § 2423(f); in violation of Title 18, United States Code, Section 2423(d).

COUNTS 26 THROUGH 29
(Travel to Engage in Illicit Sexual Conduct: 18 U.S.C. § 2423(b))

63. Paragraphs 1 through 25 of this Indictment are re-alleged and incorporated by reference as though fully set forth herein.

64. On or about the dates enumerated as to each count listed below, from a place outside the Southern District of Florida to a place inside the Southern District of Florida, the

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Defendant(s) listed below traveled in interstate commerce for the purpose of engaging in illicit sexual conduct as defined in 18 U.S.C. § 2423(f), with a person under 18 years of age, that is, the person(s) listed in each count below:

Count	Date(s)	Minor(s) Involved	Defendant(s)
26	7/16/2004	Jane Doe #7 Jane Doe #8 Jane Doe #9 Jane Doe #10	JEFFREY EPSTEIN SARAH KELLEN NADIA MARCINKOVA
27	3/31/2005	Jane Doe #14 Jane Doe #15 Jane Doe #16	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS, a/k/a "Adriana Mucinska"
28	9/18/2005	Jane Doe #16	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS, a/k/a "Adriana Mucinska"
29	9/29/05	Jane Doe #16	JEFFREY EPSTEIN SARAH KELLEN ADRIANA ROSS, a/k/a "Adriana Mucinska" NADIA MARCINKOVA

All in violation of Title 18, United States Code, Sections 2423(b) and 2.

FORFEITURE 1

Upon conviction of the violation alleged in Count 1 of this indictment, the defendants, JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA, shall forfeit to the United States any property, real or personal, which constitutes or is derived from proceeds traceable to the violation.

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Pursuant to Title 28, United States Code, Section 2461; Title 18, United States Code, Section 981(a)(1)(C); and Title 21, United States Code, Section 853.

If the property described above as being subject to forfeiture, as a result of any act or omission of the defendants, JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA,

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

All pursuant to Title 28 United States Code, Section 2461; Title 18, United States Code, Section 981(a)(1)(C); and Title 21 United States Code, Section 853.

FORFEITURE 2

Upon conviction of any of the violations alleged in Counts 12-29 of this indictment, the defendants, JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA, shall forfeit to the United States any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such

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offense; and any property, real or personal, used or intended to be used to commit or to promote the commission of such offense, including but not limited to the following:

a. A parcel of land located at 358 El Brillo Way, Palm Beach, Florida 33480, including all buildings, improvements, fixtures, attachments, and easements found therein or thereon, and more particularly described as:

> Being all of Lot 40 and the West 24.3 feet of Lot 39, El Bravo Park, as recorded in Plat Book 9, Page 9, in the records of Palm Beach County, Florida and
>
> BEING that portion lying West of Lot 40, El Bravo Park, in Section 27, Township 43 South, Range 43 East, as recorded in Plat Book 9, Page 9, Public Records of Palm Beach County, Florida, being bounded on the West by the West side of an existing concrete seawall and the northerly extension thereof as shown on the Adair & Brady, Inc., drawing IS-1298, dated March 25, 1981, and bounded on the East by the shoreline as shown on the plat of El Bravo Park, and bounded on the North and South by the Westerly extensions of the North and South lines respectively of Lot 40, containing 0.07 acres, more or less.
>
> Pursuant to Title 18, United States Code, Section 2253.

If any of the forfeitable property described in the forfeiture section of this indictment, as a result of any act or omission of the defendants JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA,

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

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(e) has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 2253(o), to seek forfeiture of any other property of said defendant up to the value of the above forfeitable property.

Pursuant to Title 18, United States Code, Section 2253.

FORFEITURE 3

Upon conviction of any of the violations alleged in Counts 2-11 of this indictment, the defendants, JEFFREY EPSTEIN, SARAH KELLEN, ADRIANA ROSS, a/k/a "Adriana Mucinska," and NADIA MARCINKOVA, shall forfeit to the United States any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and any property, real or personal, constituting or derived from any proceeds that such person obtained, directly or indirectly, as a result of such violation, including but not limited to the following:

a. A parcel of land located at 358 El Brillo Way, Palm Beach, Florida 33480, including all buildings, improvements, fixtures, attachments, and easements found therein or thereon, and more particularly described as:

> Being all of Lot 40 and the West 24.3 feet of Lot 39, El Bravo Park, as recorded in Plat Book 9, Page 9, in the records of Palm Beach County, Florida and
>
> BEING that portion lying West of Lot 40, El Bravo Park, in Section 27, Township 43 South, Range 43 East, as recorded in Plat Book 9, Page 9, Public Records of Palm Beach County, Florida, being bounded on the West by the

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West side of an existing concrete seawall and the northerly extension thereof as shown on the Adair & Brady, Inc., drawing IS-1298, dated March 25, 1981, and bounded on the East by the shoreline as shown on the plat of El Bravo Park, and bounded on the North and South by the Westerly extensions of the North and South lines respectively of Lot 40, containing 0.07 acres, more or less.

Pursuant to Title 18, United States Code, Section 1594(b).

A TRUE BILL.

_____

FOREPERSON

_____

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

_____

A. MARIE VILLAFAÑA
ASSISTANT UNITED STATES ATTORNEY

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§ 7201,[1] and one count of filing a false income tax return in April of 1981, a violation of 26 U.S.C. § 7206(1).[2] The government alleges that Harvey kept millions of dollars derived from his lucrative drug dealings in a bank account in the Cayman Islands. In his individual income tax return for the year 1980, however, Harvey denied that he had any proprietary interest in, or authority over, any bank account outside the United States.[3] Harvey also failed to report the interest income he allegedly earned on his Cayman Islands account on his individual income tax returns for the years 1978 to 1982.

Harvey filed a motion in the district court on June 2, 1986 in which he alleged that the government had informally granted him use immunity in return for his cooperation in a drug investigation in 1980. Harvey sought a pretrial hearing to require the government to prove that the evidence it proposed to use at trial was derived from a legitimate source independent of the immunized testimony, as *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d [redacted] (1972), required. The immunity agreement was never reduced to writing, but Harvey was able to point to a letter from the United States Attorney for the Southern District of Alabama acknowledging that Harvey had reached an agreement with the government in 1980.

The government denied that Harvey had been granted any immunity other than a simple agreement not to prosecute him for certain charges pending in Alabama. Because it disputed the very existence of a grant of immunity, the government objected to the holding of a *Kastigar* hearing as unwarranted.

Faced with this disputed claim of an unwritten grant of immunity, the magistrate did not hold a traditional *Kastigar* hearing, as Harvey had requested. Instead, she held a series of "pre-*Kastigar*" hearings in order to determine (1) whether Harvey had been granted immunity in 1980, (2) if so, what kind of immunity the government had granted, and (3) what information Harvey had revealed to the government.

The "pre-*Kastigar*" hearings revealed that in June of 1980 a grand jury sitting in the Southern District of Alabama had indicted Harvey and several others for the attempted importation of a large quantity of quaalude tablets. The government's case against Harvey was indefensible—

1. Title 26 U.S.C. § 7201 provides in part as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined ..., or imprisoned not more than 5 years, or both, together with the costs of prosecution.

The fine for a violation of section 7201 committed before September 3, 1982 is an amount not more than $10,000. For violations committed after that date, Congress has increased the potential penalty to not more than $100,000. Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, § 329, 96 Stat. 324, 617-18 (1982).

2. Title 26 U.S.C. § 7206(1) provides in part:

> Any person who—
>
> (1) DECLARATION UNDER PENALTIES OF PERJURY.—Willfully makes and subscribes any return statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not [redacted] to be true and correct as to every material matter; or
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution.

As for violations of section 7201, the fine for a violation of section 7206(1) is an amount not more than $10,000 for violations committed before September 3, 1982, $100,000 if committed after that date. Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, § 329, 96 Stat. 324, 617-18 (1982).

3. Harvey answered "no" to the following question: "At any time during the tax year, did you have an interest in or a signature or other authority over a financial account in a foreign country (such as a bank account, or other financial account)?" *See* U.S. Individual Income Tax Return 1980 (Form 1040), Schedule B, Part III (Foreign Accounts and Foreign Trusts). *See also* 31 C.F.R. §§ 103.24, 103.26(c) (1980) and form TD-F 90-22.1 (requiring each person subject to U.S. jurisdiction to report any interest in a bank account in a foreign country).

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"slam dunk" to use the evocative words of Harvey's lawyer at the time. Making the best of the situation, Harvey decided to cooperate with the government.

Although the United States Attorney in the Southern District of Alabama did not need any of the testimony Harvey offered, his counterpart in the Southern District of Florida did. Thus, Harvey was able to reach a three-sided agreement with the government. Although there was some dispute at the "pre-*Kastigar*" hearings about the specific terms of the actual bargain struck between Harvey and the government, the witnesses agreed that the United States Attorney for the Southern District of Alabama offered to dismiss the indictment pending in that district in return for Harvey's cooperation with an investigation that the United States Attorney for the Southern District of Florida was conducting. The United States Attorney for the Southern District of Florida sent several Drug Enforcement Administration ("DEA") agents to Alabama where they interviewed Harvey. Apparently Harvey met his side of the bargain, and the United States Attorney dismissed the indictment against Harvey in the Alabama quaalude case.

The testimony differed sharply as to any further elements of the agreement. After weighing all the evidence, the magistrate found that in addition to agreeing to drop the Alabama indictment, the government had granted Harvey both transactional immunity and use immunity for any information he had revealed to the DEA officials in 1980.

Because the DEA agents who interviewed Harvey had failed to keep any records whatsoever of their conversations with Harvey, the daunting task of reconstructing what Harvey disclosed to the DEA agents in 1980 now faced the magistrate. The magistrate found that Harvey had told the agents about all of the drug deals in which he had been involved before and at the time of his arrest in 1980, and had also "divulged ... his financial dealings with respect to his illegal drug deals." This information included the identification of the funds in the Cayman Islands bank.

Having thus determined what had happened in 1980, the magistrate turned to the 1985 tax evasion indictment. Stephen Snyder, the Justice Department's Criminal Tax Division attorney responsible for the investigation of the government's case and its presentation to the grand jury appeared at the "pre-*Kastigar*" hearings. Snyder testified that the government had used the net worth method of proving to the grand jury that Harvey had substantially underreported his income in the prior years.[4] In addition, the government also introduced documents obtained from the Bank of Nova Scotia in the Cayman Islands showing payment of interest to Harvey during the years in question.[5] Snyder further testi-

4. Under the net worth method the government establishes the taxpayer's total assets and liabilities at the beginning of the year and compares them with the taxpayer's assets and liabilities at the end of the year. If the excess of assets over liabilities increases during the year the increase is taxable unless the taxpayer can show that the increase represents nontaxable income. *See, e.g., Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) (approving net worth method of reconstructing taxable income under predecessor of current Internal Revenue Code section 446).

5. In a separate motion before the district court Harvey sought to have the court exclude these documents which the government had obtained through the "United Kingdom-United States: Agreement Concerning Obtaining Evidence From Cayman Islands With Regard to Narcotics Activities." The gravamen of Harvey's argument is that the United States may obtain evidence from the Cayman Islands under the agreement only when it does so as part of an investigation for narcotics violations. Because the government was investigating him solely for tax evasion, Harvey argues that it could not invoke the provisions of the agreement (even though the corpus of the money was derived from narcotics activity). The district court dismissed the indictment against Harvey before addressing this question; therefore, because this question is not now before us, we do not address it, nor do we address Harvey's standing to raise it.

During oral argument Harvey also suggested that the government must have used the testimony he gave under immunity when it certified to the government of the Cayman Islands—as it had to in order to obtain documentary evidence under the terms of the agreement—that Harvey was involved in narcotics activity. Because we conclude that the government is entitled to

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fied that he told the grand jury that the probable source of Harvey's income was his drug-related activities.

The magistrate did not allow the government to show that it had derived the evidence it presented to the grand jury—or that it intended to introduce at trial—from legitimate independent sources. The hearing transcript, currently under seal, reveals conclusively that Snyder began to testify about the trail that led to Harvey's Cayman Islands bank account, but upon the objection of Harvey's counsel, the magistrate stopped Snyder from testifying further. The magistrate considered such information irrelevant to the "pre-*Kastigar*" hearing; instead, the magistrate reasoned that whether the government derived the information leading to the indictment from independent sources was properly a matter only for a true *Kastigar* hearing.

With the findings of fact set out, the magistrate then made a "Finding of Law" in which she concluded that the information concerning Harvey's drug activities and related financial dealings formed the basis for the tax indictment and was "inextricably tied" to the information that Harvey had revealed to the DEA agents in 1980. Even though she had refused the government the opportunity to demonstrate that the evidence against Harvey came from a source independent of the immunized testimony, the magistrate concluded that the evidence presented to the grand jury was "tainted." The magistrate further concluded that the indictment violated the grant of immunity extended to Harvey and recommended that the district court dismiss the indictment.

The district court reviewed the record *de novo* and agreed with the magistrate's factual finding that the government had extended both use and transactional immunity to the appellee. The district court dismissed the indictment with prejudice.

For the purposes of this appeal the government does not dispute the factual findings of the magistrate and district court that Harvey received transactional and use immunity in 1980 and that he told the DEA agents about his financial dealings, including the existence of the funds in the Cayman Islands. The government, however, vigorously disagrees with the legal conclusion that such a grant of immunity given in 1980 bars Harvey's prosecution for failure to report the existence of a foreign bank account or the interest earned on that account in years after that grant of immunity.[6]

II. INFORMAL GRANTS OF IMMUNITY

We note at the outset that this appeal would not be necessary had the United States Attorneys for the Southern Districts of Alabama and Florida reduced their agreement with Harvey to writing. The magistrate and district court have been put through the arduous task of reconstructing the terms of the agreement with the government, a task made still more difficult by the astonishing failure of the DEA agents who interviewed Harvey to keep any written records of those interviews. Informal grants of immunity are by their very nature less certain than formal grants, and thus are much more likely to create confusion for the government and for the courts in the future. As long as prosecutors continue the practice of unwritten grants of immunity, they open the door for subsequent litigation such as this, and for adverse decisions as well.

[1] Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes. *See Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984) (plea agreement); *Santobello v. New York*, 404

prove that it derived the evidence against Har- from sources independent of the immunized testimony, we need not address this.

6. Thus, the government at least implicitly has come to recognize that the 1980 immunity agreement bars any prosecution for tax evasion allegedly committed before September of 1980 (the date of the immunity agreement), or any other legal action, such as forfeiture, that might arise from violations that allegedly took place before the immunity agreement. Harvey got a fresh start in 1980, including his Cayman Islands money.

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U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (plea agreement); *In re Arnett*, 804 F.2d 1200 (11th Cir.1986) (plea agreement); *Rowe v. Griffin*, 676 F.2d 524 (11th Cir. 1982) (immunity); *United States v. Weiss*, 599 F.2d 730, 737 (5th Cir.1979) (immunity) (Tuttle, J.) ("To protect the voluntariness of a waiver of fifth amendment rights, where a plea, confession, or admission is based on a promise of a plea bargain or immunity, the government must keep its promise."). *See also Plaster v. United States*, 789 F.2d 289 (4th Cir.1986) (immunity); *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir.1985) (plea agreement); *United States v. Carter*, 454 F.2d 426, 427 (4th Cir.1972) (in banc) (immunity) ("if the promise was made to defendant as alleged and the defendant relied upon it in incriminating himself, the government should be held to abide by its terms"). This is true because by entering into a plea agreement the defendant forgoes his important constitutional right to a jury trial, or by testifying under a grant of immunity he forgoes his fifth amendment privilege. In either case courts will enforce the agreement when the defendant or witness has fulfilled his side of the bargain.

[2] Although federal law no longer provides for formal, statutory grants of transactional immunity,[7] a prosecutor may, as in this case, informally grant transactional immunity to a witness in return for his cooperation in a criminal case. Similarly, although 18 U.S.C. §§ 6002–6003 provide for court-supervised grants of use immunity, prosecutors may extend such immunity informally as well. Harvey did not receive a formal (statutory) grant of transactional or use immunity, yet because due process requires us to enforce the government's agreement with Harvey, we apply the same rules and method of analysis to an informal grant of use or transactional immunity as we would to a formal grant.[8] *E.g., United States v. Quatermain*, 613 F.2d 38, 41 (3d Cir.), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980). We will examine each in turn.

III. USE IMMUNITY

The first issue we address is the effect the 1980 grant of use immunity has on the current prosecution for tax evasion. This question is essentially evidentiary in nature. As we discuss below, the government may not use, either directly or derivatively, any testimony Harvey gave under the 1980 grant of use immunity against him in a subsequent related prosecution. We discuss in a separate section the analytically distinct question of whether the government may *ever* prosecute Harvey for tax evasion. Resolution of that question depends on the scope of the 1980 grant of *transactional* immunity Harvey received.

[3–5] Use immunity prohibits the use of compelled testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution. *See generally Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d [redacted] (1972). In contrast to transactional immunity, use immunity does not prohibit the government from prosecuting the witness for crimes about which he testified, provided the government proves that it has other evidence to support the prosecution that "is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, 406 U.S. at 460, 92 S.Ct. at 1665. Pursuant to Title 18 U.S.C. §§ 6002–6003, a district court may formally grant use immunity to a witness who refuses to testify on the basis of his fifth amendment privilege, or, as here, a prosecutor may informally grant use immunity to a witness in return for his cooperation in a criminal case. When a defendant has dem-

7. As a part of the Organized Crime Control Act of 1970 Congress added the current scheme for statutory grants of use immunity, currently codified at 18 U.S.C. §§ 6001–6005, and repealed [redacted] other immunity statutes, including transactional immunity provisions, that had been scattered throughout the United States Code. Pub.L. No. 91–452, §§ 201–260. 84 Stat. 922 (1970).

8. We note that the government has not alleged that Harvey in some way failed to meet his end of the bargain. Therefore, our task is simply to enforce the agreement with Harvey.

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onstrated that he testified under a grant of use immunity, the burden shifts to the prosecution which then has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent" of the testimony given under the grant of immunity. *See Braswell v. United States*, — U.S. —, 108 S.Ct. 2284, 2295, 101 L.Ed.2d 98 (1988); *Kastigar*, 406 U.S. at 460, 92 S.Ct. at 1665. *See also Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 n. 18, 84 S.Ct. 1594, 1609 n. 18, 12 L.Ed.2d 678 (1964).

The government contends that it derived the evidence it used to secure Harvey's indictment by the grand jury and the evidence it intended to use at trial, from an independent source. In essence, the government claims that while investigating someone else the Criminal Tax Division of the Justice Department came upon a trail of evidence that led to Harvey's bank account in the Cayman Islands.

As we noted above, the record reveals that the magistrate did not permit the government to show the independe[redacted] sources of its evidence against Harve[redacted] The magistrate recommended that the i[redacted] dictment be dismissed after having conducted only the "pre-*Kastigar*" hearing. Similarly, the district court dismissed the indictment in part because it believed that all of the government's evidence was given under the 1980 grant of immunity. Yet such a conclusion was premature without giving the government the opportunity to meet its burden under *Kastigar* of proving the independent source of its evidence. For the same reason, any conclusion that tainted evidence sufficient to justify dismissing the indictment was presented to the grand jury was also premature because the government may have been able to demonstrate that the evidence was not tainted at all.

IV. TRANSACTIONAL IMMUNITY

A.

[6] The more difficult issue in this appeal is whether the transactional immunity Harvey received in 1980 prohibits the government from prosecuting him for tax violations committed *after* that grant of immunity. We conclude that it does not.

[7] Transactional immunity "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed. 2d 212 (1972).[9] The purpose of a grant of transactional (or use) immunity is to preclude a witness's reliance on his fifth amendment privilege against compelled self-incrimination: the government may compel a witness to testify by granting him immunity, provided that the scope of the immunity is at least as great as that of the fifth amendment privilege that the witness must forego. *See Kastigar v. United States*, 406 U.S. at 449, 92 S.Ct. at 1659; *Counselman v. Hitchcock*, 142 U.S. 547, 564, 586–87, 12 S.Ct. 195, 198, 206, 35 L.Ed. 1110 (1892). As such, in deciding the scope of a grant of immunity the Supreme Court traditionally has referred to the scope of the fifth amendment privilege itself.

For example, in *Heike v. United States*, 227 U.S. 131, 33 S.Ct. 226, 57 L.Ed. 450 (1913) (Holmes, J.), the Court refused to construe broadly a transactional immunity statute that provided that "no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under [the interstate commerce and anti-trust acts]." *Heike*, 227 U.S. at 141, 33 S.Ct. at 227 (quoting Act of February 25, 1905, ch. 755, 32 Stat. 904). The Court saw "no reason for supposing that the act offered a gratui-

9. Transactional immunity statutes typically provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise ..." *Kastigar v. United States*, 406 U.S. 441, 451, 92 S.Ct. 1653, 1660, 32 L.Ed.2d [redacted] (1972) (quoting from Compulsory Testimony Act of 1893, which served as a model for numerous federal immunity statutes).

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ty to crime." *Id.* at 142, 33 S.Ct. at 228. Instead, the Court reasoned that a grant of immunity "should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned." *Id.*, 33 S.Ct. at 228. *See also Shapiro* [redacted] *United States*, 335 U.S. 1, 19, 68 S.Ct. 1375, 1385, 92 L.Ed. 1787 (1948) (following rule of construction of *Heike*). More recently, in *Kastigar*, the Court upheld the constitutionality of 18 U.S.C. § 6002 on the ground that use immunity "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." 406 U.S. at 453, 92 S.Ct. at 1661.

The Court noted in *Kastigar* that transactional immunity is broader than the fifth amendment privilege because it provides for full immunity from future prosecution, while the fifth amendment privilege "has never been construed to mean that one who invokes it cannot subsequently be prosecuted." *Id.* Yet the Court has never indicated that transactional immunity is in any other respect broader than the fifth amendment privilege. Thus, transactional immunity and use immunity are coterminous with the fifth amendment privilege in all respects other than their effect on the government in the future. A grant of use immunity prohibits the government from using evidence disclosed either directly or derivatively, while a grant of transactional immunity prohibits the government from prosecuting the witness at any time with respect to the incriminating matters the witness disclosed.

Although *Kastigar* and *Heike* were cases in which the witness refused to testify, and thus the Court had to look to the scope of the fifth amendment privilege in order to determine whether the proffered immunity sufficed to displace that privilege, we believe the same principles apply to the case before us now. The magistrate found as a fact, and the district court affirmed her finding, that the government extended use and transactional immunity to Harvey in return for his cooperation, i.e., his testimony. Absent any factual finding to the contrary, we believe it proper to conclude that this grant of immunity was fully as broad as the fifth amendment privilege that Harvey gave up when he disclosed his illegal activities to the DEA agents. By the same token, we believe that—absent any contrary factual finding—we should not conclude that the scope of the immunity Harvey received was any greater than that of the fifth amendment privilege he gave up.[10] Thus, Harvey received transactional and use immunity for any testimony as to which he could have invoked his fifth amendment privilege in September of 1980.

With this in mind, we turn now to the issue of when may a witness invoke his fifth amendment privilege with respect to a crime he has not yet committed.

B.

[8] In general, the privilege against self-incrimination only prohibits compelled testimony that might incriminate a witness for crimes he had already committed, or was in the process of committing, at the time the testimony was given. *See Counselman*, 142 U.S. at 562, 12 S.Ct. at 198 (purpose of privilege is "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself *had committed* a crime") (emphasis added); *United States v. Quatermain*, 613 F.2d 38, 42 (3d Cir.), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980). Twenty years ago, however, the Supreme Court rejected a rigid chronological test under the fifth amendment privilege, focusing instead on the substantiality of the risk the witness faced.

10. We note that neither the magistrate nor the district court found that the plea agreement included anything other than the dismissal of the Alabama indictment and the grant of use and transactional immunity. Nor does Harvey suggest during this appeal that his agreement involved anything more. Thus, we are working solely with the familiar categories of transactional and use immunity, and do not face any different "species" of immunity—e.g., an express agreement not to prosecute for future tax violations with respect to the Cayman Islands funds.

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In *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) the Supreme Court held that the fifth amendment privilege was not entirely inapplicable to prospective acts. The petitioner in *Marchetti* was convicted of violating provisions of a statute that required professional gamblers to register annually with the Internal Revenue Service and pay an occupational tax. The Court, overruling a prior case that had upheld the very same statute, *United States v. Kahriger*, 345 U.S. 22, 73 S.Ct. 510, 97 L.Ed. 754 (1953), held that the petitioner's assertion of his fifth amendment privilege in refusing to comply with the statute provided a complete defense to his prosecution for failing to register and pay the occupational tax.[11]

Marchetti explicitly rejected the notion that the fifth amendment privilege offers protection only as to past and present acts. 390 U.S. at 53, 88 S.Ct. at 705. Instead, the Court emphasized that "[t]he central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.*, 88 S.Ct. at 705. Relying on this standard, the Court held that the hazards of incrimination created by the registration and occupational tax provisions as to future acts were not "trifling or imaginary" because prospective registrants could reasonably expect that compliance with these provisions "may serve as decisive evidence that they have in fact subsequently violated state gambling prohibitions." *Id.*, 88 S.Ct. at 706.

Although application of this standard proved favorable to the petitioner in *Marchetti*, the Court stressed that this would not usually be the case, as prospective acts "will doubtless ordinarily involve only speculative and insubstantial risks of incrimination." *Id.* at 54, 88 S.Ct. at 705. Thus, although *Marchetti* created an exception to the general rule that the fifth amendment privilege applies only to past and present criminal acts, the exception is a very narrow one.

In *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), the Court emphasized the narrowness of the fifth amendment privilege's application to future conduct. In *Freed*, the Court rejected the argument that a registration requirement of the National Firearms Act violated the fifth amendment because the information disclosed could be used in connection with offenses that the transferee of the firearm might commit in the future. In so doing, the Court stated:

> Appellee's argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgressions but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation.

Id. at 606–07, 91 S.Ct. at 1117. Thus, *Marchetti* and *Freed* teach that the focus of inquiry under the fifth amendment is whether the witness faces a substantial risk of incrimination. When the witness has not yet committed the crime, or is not in the process of committing it, his risk of incrimination is generally so speculative as to remove him from the aegis of the fifth amendment privilege.

Lower court opinions also make clear that the fifth amendment privilege rarely will apply to future conduct. For example, in *United States v. Quatermain*, 613 F.2d 38, 42–43 (3d Cir.), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980), the court noted that *Marchetti* did not support the defendant's argument that the fifth amendment privilege applies to a witness who refuses to testify because he asserts that his testimony somehow may be

11. *Marchetti* also overruled *Lewis v. United States*, 348 U.S. 419, 75 S.Ct. 415, 99 L.Ed. 475 (1955), which had held that the wagering tax provisions did not violate the fifth amendment privilege because they were not compulsory. According to the *Lewis* Court, "[t]he only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax." 348 U.S. at 422–23, 75 S.Ct. at 418.

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used to incriminate him in a prosecution for a different type of criminal act that he may commit in the future. Accordingly, the court held that the defendant's testimony under an informal grant of use immunity about his involvement in a drug ring did not prevent the government from indicting him for subsequently manufacturing a gun silencer, even though the district court found that the defendant's immunized testimony had helped lead to the indictment on the gun charge. *See also United States [redacted] Gallo*, 859 F.2d 1078, 1088 (2d Cir.1988) (Van Graafeiland, J., concurring) ("Licensing and taxing statutes aside, the only hazards of incrimination that are likely to be considered substantial and real are those which relate to existing or past misdeed or a continuing course of criminal activity.").

C.

When we apply these principles to the case at hand, we see that the information Harvey revealed to the DEA agents in September of 1980 could not have created substantial and real hazards that it would incriminate him for tax crimes he later allegedly committed in April of 1981, 1982 and 1983. Counts three through five of the indictment charged Harvey with evasion of income taxes for the years 1980, 1981, and 1982, offenses that could not have occurred until April of 1981, 1982, and 1983, when Harvey filed his tax returns for the preceding years.[12] Furthermore, the crime of willfully filing a false tax return for income earned in 1980, as charged in count six of the indictment, could not have occurred until April of 1981 when Harvey filed the allegedly fraudulent return.[13] Thus, although the crimes charged in counts three and six of the indictment related to Harvey's 1980 taxes, the immunity granted in 1980 did not apply to these crimes, because they did not occur until April of 1981, well after immunity was granted.

According to his testimony at the pre-*Kastigar* hearing, Harvey had revealed to the DEA agents that he had deposited millions of dollars, earned through illegal drug transactions, into his accounts at the Nova Scotia Bank in the Cayman Islands. He also told the agents how he set up corporations in the Cayman Islands to launder drug money. In September of 1980, the defendant could not have had "substantial and real" fears that this information would incriminate him for evasion of taxes on interest income that either was not yet required to be reported or had not yet been earned, or for filing a false income tax return that was not due for months to come.[14] Harvey could not have asserted his fifth amendment privilege with respect to these matters, therefore they are outside the scope of the immunity he received in 1980.

Put another way, each failure to report income and each failure to disclose the Cayman Islands account was a separate *transaction*, in the eyes of the law separable from the transactions for which Harvey received immunity. Harvey had a right by contract to receive the interest income on his money, a right he presumably could have enforced in a Cayman Islands court. Similarly, each year Harvey's failure to report the interest on the foreign account was a separate transaction. The duty to report the existence of the foreign bank account in April of 1981, was a separate transaction, unrelated to what had gone before. The mere fact that Harvey failed to disclose funds the existence of which he had disclosed under a grant of

12. *See Sansone [redacted] United States*, 380 U.S. 343, 351, 85 S.Ct. 1004, 1010, 13 L.Ed.2d 882 (1965) (violation of 26 U.S.C. § 7201 does not occur until the defendant commits an affirmative act constituting an evasion or attempted evasion of the tax).

13. *See United States v. Bishop*, 412 U.S. 346, 357–58, 93 S.Ct. 2008, 2016, 36 L.Ed.2d 941 (1973).

14. Even if Harvey was certain that he intended to conceal the existence of the Cayman Islands [redacted] and the interest earned there from his future tax returns, that would not suffice to make the threat of future prosecution "real and substantial." A witness may not say under a grant of immunity, "I am an inveterate tax cheat," and later claim immunity from any future tax violations. The law will not deem his risk of incrimination substantial because the law expects him to be honest in the future.

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immunity does not alter the independent duty Harvey had to report his income accurately.

We must reject Harvey's argument that the 1980 grant of transactional immunity somehow shielded the Cayman Islands funds themselves from the reach of the tax laws.[15] There is no such thing as *in rem* immunity. Harvey became immune from prosecution for those transactions about which he testified, but the money he disclosed did not somehow partake of this immunity. The grant of transactional immunity the government extended to Harvey in 1980 does not prohibit prosecution for tax violations he allegedly committed in the years following that grant of immunity.

CONCLUSION

For the reasons we have stated above, we REVERSE the decision of the district court and REMAND for proceedings consistent with this opinion.

CLARK, Circuit Judge, dissenting:

The majority has written a well reasoned opinion on the scope of formal statutory immunity. Insofar as the court holds that under a formal grant of immunity, an individual is shielded from prosecution only to the extent of his Fifth Amendment privilege, I believe it correctly states the law. Unfortunately, this case does not involve formal statutory immunity. Instead, this case involves an agreement between the defendant and the prosecutor in which the prosecutor agreed not to prosecute the defendant in return for his cooperation. Not only does the majority fail to recognize the fundamental difference between the two forms of immunity, it assumes that the same rules apply to formal and informal immunity. Since the same principles do not apply, I dissent. To understand why the analysis of the majority is erroneous, it is necessary to understand the various forms of "immunity." Only with that understanding it is possible to apply the correct analysis to the case at hand.

I

In two key sections, the majority states that the same rules apply to formal and informal immunity. *Supra* at 1444, 1446. Specifically the majority holds that the scope of any grant of immunity is defined by the Fifth Amendment. Before explaining this error, it is necessary to understand the difference between transactional and use immunity as well as the difference between formal and informal immunity. Transactional immunity "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). Use immunity, on the other hand, is more limited; it protects the individual from prosecution through the use of the immunized testimony or evidence derived from that testimony. Therefore, while transactional immunity prohibits any future prosecution, use immunity only limits the government's manner of proof in a subsequent prosecution. This distinction is significant in this case because the magistrate found that the government granted Harvey "transactional immunity" or full immunity from prosecution. As the majority correctly states, the issue in this case is the scope of that "transactional immunity." The majority holds that the scope is coextensive with the Fifth Amendment privilege. To understand why the majority is incorrect, it is necessary to understand the distinction between formal and informal immunity. Because the two forms of immunity come from different sources, the scope of each type of immunity differs.

Formal or statutory immunity is set out in 18 U.S.C. § 6001 *et seq.* Immunity is granted by a court upon the U.S. Attorney's request when a witness refuses to testify before a grand jury or at trial based

15. Whether Harvey himself reasonably believed this is a matter for the jury, which under 26 U.S.C. §§ 7201 and 7206(1) must find that he wilfully violated the reporting requirements of the tax code. *See* supra, notes 1 & 2. We need not address the reasonableness of Harvey's belief.

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on his Fifth Amendment privilege against self-incrimination. 18 U.S.C. § 6003(a). The statute authorizes the granting of "use" and derivative use immunity. 18 U.S.C. § 6002. Several points are noteworthy. First, a United States Attorney does not have the power to grant formal immunity. Instead, he must first subpoena a witness and if the witness invokes the Fifth Amendment privilege, the prosecutor must obtain approval by the Attorney General or Deputy Attorney General and then request the court to order the witness to testify. 18 U.S.C. § 6003.[1] Second, the statute only authorizes use immunity, not transactional immunity. Third, since formal immunity is granted to overcome a witness' invocation of the Fifth Amendment, the Supreme Court has held that the scope of the immunity granted must be as broad as the privilege. *Kastigar*, 406 U.S. at 450, 92 S.Ct. at 1659.

Due to the cumbersome requirements of obtaining properly authorized statutory immunity, U.S. Attorneys often make informal agreements with individuals in return for their cooperation. *See United States v. Quatermain*, 613 F.2d 38, 45 (3d Cir.) (Aldisert, J., dissenting), *cert. denied*, 446 U.S. 954, 100 S.Ct. 2923, 64 L.Ed.2d 812 (1980). The agreements are perfectly analogous to plea agreements: an individual with valuable information bargains with the prosecutor with respect to pending charges in return for that individual's cooperation. A usual condition of cooperation is that the individual not be subject to prosecution for any of the information he provides. *See id.* A prosecutor's power to grant informal immunity derives from his inherent discretion over prosecuting cases; just as a prosecutor has the discretion to plea bargain, he has the discretion to grant an individual immunity from prosecution. We have held that "due process requires the prosecutor's promise to be fulfilled." *Rowe v. Griffin*, 676 F.2d 524, 528 (11th Cir.1982); *see also Plaster v. United States*, 789 F.2d 289, 293 (4th Cir.1986); *United States v. Fountain*, 776 F.2d 878, 882 (10th Cir.1985); *United States v. Carter*, 454 F.2d 426, 428 (4th Cir.1972).

This practice has been dubbed "informal immunity," "hip pocket immunity," *see Quatermain*, 613 F.2d at 45, or "equitable immunity." *Rowe*, 676 F.2d at 526. Additionally, since the prosecutor often agrees not to prosecute at all, these agreements are sometimes carelessly labeled "transactional immunity." *See Rowe*, 676 F.2d at 526 (since prosecutor promised Rowe there would be no subsequent prosecution, court stated he was offered "transactional immunity"). All these terms are unfortunate misnomers because they lead to confusion with formal statutory immunity. Such confusion ignores the fact that the two types of immunity derive from totally different sources and that the source of the immunity determines the scope of a specific grant of immunity. For example, 18 U.S.C. § 6002 only authorizes *use* immunity. More importantly, because statutory immunity is granted to avoid reliance on the Fifth Amendment privilege, the scope of immunity must be coextensive with the Fifth Amendment privilege. The Fifth Amendment only protects an individual against divulging information about future conduct if he faced a substantial risk of incrimination as to those events at the time. *See United States v. Freed*, 401 U.S. 601, 603, 91 S.Ct. 1112, 1115, 28 L.Ed.2d 356 (1971) (firearm registration requirement did not violate Fifth Amendment); *Marchetti v. United States*, 390 U.S. 39, 53, 88 S.Ct. 697, 705, 19 L.Ed.2d 889 (1968) (tax registration requirements violated fifth amendment because registrants could expect provisions to serve as evidence of violation of gambling laws). It therefore follows that under a formal grant of immunity, a witness is only immunized with respect to conduct if he faced a substantial risk of incrimination as to those events when he testified.

In cases of informal immunity, however, the scope of the immunity is not limited by

1. Immunity is only available when the testimony is necessary to the public interest and the individual has refused or is likely to refuse to testify on the basis of the privilege. 18 U.S.C. § 6003.

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the Fifth Amendment. As Judge Fay has pointed out,

> under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is 'coerced' evidence and may not be used against the accused. For purposes of compelling testimony which otherwise would be privileged by the fifth amendment, all that is constitutionally required is a grant of use immunity. *However, in order to secure testimony, evidence or other cooperation from a potential criminal defendant, a prosecutor may see fit to promise complete immunity from prosecution.*

Rowe, 676 F.2d at 527 (emphasis added). *Rowe* holds that the government must offer at least use immunity when an individual is induced to cooperate, but that there is no limit to what the defendant can demand in return for his cooperation. *See Quatermain*, 613 F.2d at 45 (Aldisert, J., dissenting) ("[T]he United States Attorney is at liberty to impose conditions that usually relate to testifying or providing certain information. For his part the ... informant often imposes conditions of his own, usually relating to agreements not to prosecute but often covering other matters as well[.]"). If the potential informant demands too much, the government may decide that the information is not worth the price or the government can always subpoena the potential informant to testify before a grand jury or at the trial thereby ensuring that the informant is only granted use immunity. This discussion illustrates that the scope of an informal grant of immunity depends on the bargain struck.

The majority therefore is incorrect to assume the same principles apply to determining the scope of formal and informal immunity. In determining that the Fifth Amendment defines the scope of a grant of *informal* immunity, the majority ignores the cited quotation from *Rowe*. The only case the majority cites as support for its conclusion is *United States v. Quatermain*, 613 F.2d 38 (3d Cir.1984). Unfortunately, in *Quatermain*, the court specifically held that the informant was granted "the *minimum* immunity required by the Constitution"—that is, *use* immunity. *Id.* at 38 (emphasis added). Therefore, the fact that the agreement provides use immunity made the Fifth Amendment case law relevant, not the fact that it was an informal grant of immunity.

Rowe provides the appropriate analysis to apply in cases of informal immunity. In *Rowe*, the court considered a prosecutor's agreement not to prosecute a Ku Klux Klan informant in return for the information he provided the state concerning a murder during the Selma to Montgomery Civil Rights March. 676 F.2d at 525.[2] The court held that such an agreement must be enforced when the defendant proves that an agreement was made, that he performed his side and that the prosecution was directly related to the assistance the defendant had given. The court specifically analogized to the case law on plea agreements and held that "as a matter of fair conduct, the government [must] honor such an agreement[.]" *Id.* at 527.

It follows then that the case law concerning the interpretation of plea agreements is relevant to the interpretation of this type of an agreement made by the prosecutor. *See id.* at 528 ("this contractual analysis applies equally well to promises of immunity from prosecution"). This court interprets a plea agreement consistently with what the defendant reasonably understood when he entered the plea. *In re Arnett*, 804 F.2d 1200, 1201–02 (11th Cir.1986). The court first determines whether the written agreement is ambiguous on its face. If the agreement is unambiguous and there is no allegation of government overreaching, the court will enforce the agreement according to its plain words. *United States v. (Michael) Harvey*, 791 F.2d 294, 300 (4th Cir.1986). If the agree-

2. In 1965, the state Attorney General agreed not to prosecute Rowe in return for his testimony at the grand jury and at trial. After new information arose that Rowe might have lied about whether he actually fired any of the fatal shots, the state attempted to prosecute him for murder. Rowe brought suit under 42 U.S.C. § 1983 to enjoin the state prosecution. 676 F.2d at 525–26.

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ment is ambiguous, the ambiguity "should be resolved in favor of the criminal defendant." *Rowe*, 676 F.2d at 526 n. 4 (ambiguity over whether Attorney General's promise bound future Attorney General was resolved in favor of the defendant); *see In re Arnett*, 804 F.2d at 1203 (government breached the agreement when it sought forfeiture of defendant's farm since written agreement ambiguous as to whether government would seek forfeiture of property and government could not satisfy heavy burden of proving defendant understood government reserved right to seek property forfeiture); *United States v. (Michael) Harvey*, 791 F.2d at 301 (imprecision in terms of written agreement construed against the government).

II

In this case, Harvey was not granted formal statutory immunity. He was never called to testify and never invoked his Fifth Amendment privilege. If he had been granted statutory immunity, a discussion of the scope of Harvey's Fifth Amendment privilege would be relevant. Instead, Harvey bargained with the government. In return for the information he provided, the government agreed to drop the charges against him in Mobile and agreed not to prosecute him for any crimes related to the information he gave. There is no doubt that Harvey entered an agreement with the government and that he performed his side. The crux of this case, therefore, depends on an interpretation of the agreement not to prosecute.

The magistrate reconstructed the agreement and found that Harvey had been granted both "transactional" and "use" immunity for the information he provided. The magistrate also determined that Harvey had told the government about the Cayman Islands funds. The majority apparently takes comfort from this finding, stating "we are working solely with the familiar categories of transactional and use immunity, and do not face any different 'species' of immunity—e.g., an express agreement not to prosecute for future tax violations with respect to the Cayman Islands." *Supra* at 1446 n. 10. Indeed as I read the majority opinion, its holding that Harvey's immunity is only as broad as the fifth amendment is *explicitly* dependent on this factual finding. *See supra* at 1446 ("By the same token, we believe that—*absent any contrary factual finding*—we should not conclude that the scope of the immunity Harvey received was any greater than that of the fifth amendment privilege he gave up.") (Emphasis added). I find this statement incomprehensible since the only "species of immunity" the prosecutor was *authorized* to grant was an agreement not to prosecute. Additionally, the magistrate's use of the terms "transactional" and "use" immunity should not be given such great weight since the term "transactional" immunity has been used by this court to describe an agreement not to prosecute. *See Rowe*, 676 F.2d at 526; *Quatermain*, 613 F.2d at 44 (Aldisert, J., dissenting) (although the district court phrased its discussion in terms of transactional and use immunity, analyzing it as an agreement not to prosecute leads to same result). Furthermore, it is clear from the magistrate's opinion that although she used the terms "transactional" and "use" immunity, she understood the critical distinction between formal and informal immunity. In rejecting the government's argument that it had no power to grant "transactional" immunity, the magistrate held

> what the government confuses with respect to immunity is the court's power under 18 U.S.C. 6001 *et seq.* to force an unwilling defendant to testify versus the government's virtually unbridled discretion to plea bargain with any defendant as to terms offered by the government. With respect to § 6001 immunity, the court can compel a defendant to testify, but can *only* grant him use and not transactional immunity. On the other hand, the executive branch can grant transactional immunity in the form of a bargain and does not need the blessing of the court to do so.

Record, Vol. 3, Tab 72 at 22. Indeed, the magistrate applied the principles applicable to plea agreements to what she described "transactional" immunity. Therefore, de-

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spite the majority's wishful thinking, we are dealing with an agreement not to prosecute.

In this case, the government never wrote down the terms of the agreement. Additionally, there is no record of the information Harvey provided. Clearly the written terms of the agreement would be the starting place for determining the scope of immunity Harvey was granted. Due to the government's gross negligence, however, we are forced to reconstruct the terms of the agreement.[3] In order to do so, the court must look to the testimony of those involved in negotiating the agreement to determine what Harvey believed the agreement provided and whether Harvey's expectations were reasonable.

Jerry Harvey testified that the government "agreed nothing I ever give [sic] them would be used against me, nor would any U.S. Attorney's Office seek to prosecute me for anything; that I was just getting a clean walk, and I should stay on the Government's side and help them." Record Vol. 3, Tab 72 at 14. Harvey's attorney, Tom Haas, testified that "the understanding I had with [the gov[redacted]nt] was that nothing that Jerr[redacted] Harv[redacted] to them, or any agent on the Government would ever at any time be used against Jerry Harvey." *Id.* at 15. This testimony supports Harvey's argument that he believed he was immune from *any* prosecution related to the information he gave. Significantly, no testimony by either of the prosecutors involved in the negotiations rebutted Harvey's broad interpretation of the agreement. In response to a question by the court, the U.S. Attorney for the Southern District of Alabama, William Kimbrough, testified that Harvey was given use immunity but that he did not know whether or not he was given transactional immunity. Finally, the prosecutor most intimately involved with the agreement, Patrick Sullivan, an Assistant U.S. Attorney in the Southern District of Florida had no recollection of *any* involvement with Jerry Lee Harvey.[4] He could not remember speaking to the Mobile U.S. Attorney's office or having any negotiations with Harvey.

The court must interpret an agreement consistently with the defendant's reasonable interpretation of the agreement. In this case, the government has failed to offer any evidence to disbelieve Harvey's view of the agreement. Instead, the government argues that it was unreasonable for Harvey to believe that the agreement would shield him from prosecution for future tax violations relating to the Cayman Islands funds. I do not agree. It is not at all clear that a lay citizen would understand that a government's agreement not to prosecute for anything related to the Cayman Islands funds would not preclude prosecution for failure to declare interest from those funds. In addition, since we have no record of the agreement we have no way of knowing what the government officials represented to Harvey as the terms of the agreement. In the absence of some evidence that Harvey knew the agreement would not cover these crimes,[5] I cannot accept the government's position. *See (Michael) Harvey*, 791 F.2d at 300 (due process requires holding government to a greater degree of responsibility for ambiguity in plea agreement than defendant). Furthermore, to the extent that the government's argument is based on the belief the

3. I emphasize this point because the majority suggests, *supra* at 1442–1443, that the only problem is that there is no record of the information provided by [redacted]. While that omission is important, it is equally problematic (and ultimately decisive in my mind) that there is no record of the terms of the agreement.

4. This is despite the fact that a letter from Mr. Sullivan was introduced in which he asked a state prosecutor to consider the fact that Harvey had cooperated with both the U.S. Attorney and the Drug Enforcement Agency. Additionally, Mr. Sullivan was unable to recall having used Harvey as a witness in a case in which he was the trial prosecutor some three to five years before the agreement.

5. I emphasize the narrowness of such a holding. The terms of the agreement, *if preserved*, might have contradicted Harvey's interpretation. Even if the agreement was ambiguous, a transcript or even notes of the negotiations might have shown that Harvey's position is unreasonable.

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government had no authority to enter the agreement as Harvey perceived it because it granted immunity for future crimes, it is not persuasive. First, it is not apparent that Harvey would know that the government did not have the power to enter the agreement as he perceived it. Second, that argument ignores the possibility that the government may have lead Harvey to believe (or at least contributed to his misunderstanding) that the agreement offered such immunity. Finally, this court has never refused to enforce a plea agreement just because the government made a bad deal.

I would therefore hold that the government agreed that it would not prosecute Harvey with respect to the Cayman Islands funds and that Harvey believed that he would not be prosecuted for failing to report the interest on the Cayman Islands funds. This does not mean that Harvey was immunized from declaring the interest. Quite the contrary, I believe that Harvey was required to pay taxes on the interest and that the government may collect those back taxes. It may not, however, *criminally prosecute* Harvey for failing to report his interest. I also do not believe that the agreement forever insulates Harvey from criminal prosecution for failing to report his taxes. Because the government failed to provide any evidence to disbelieve Harvey's view of the agreement, it is apparent that the indictment entered against Harvey on November 25, 1985 for the first time put Harvey on notice that his understanding of the agreement conflicted with the government's view. After that point, it became unreasonable for Harvey to believe the agreement provided such broad immunity.

III

In conclusion I wish to emphasize that this case presents unique facts and concerns which fortunately are of infrequent occurrence. The concern of the majority is that my view provides carte blanche authority to U.S. Attorneys to enter into plea agreements that will insulate criminals from liability for future criminal conduct. That concern has many answers, the chief of which is that U.S. Attorneys are responsible persons who do not conduct themselves as apprehended by the majority. I have tried to make clear that the holding is limited to the facts of this case. In this case, it was not unreasonable for Harvey to believe that the agreement covered the future tax consequences from the information he provided. Indeed, I have attached as an appendix excerpts from the testimony before the magistrate which show that the government may have interpreted the agreement to cover even more than this. I have also made clear that once Harvey was put on notice by the government that he was required to include income from the Cayman Island bank accounts on his income tax returns, he no longer could consider himself immune from prosecution for failure to report the income. Due process of law in the context of this case requires that Harvey be provided advance notice of the government's interpretation of the agreement, especially if the government's interpretation changed.

The majority contorts this simple case concerning an agreement not to prosecute into a use or transactional immunity case and then relies on irrelevant Fifth Amendment case authority. Here the same government that promised Harvey in a bona fide agreement that it would not seek to jail him based on information furnished in 1980 now seeks to breach that agreement. It must be remembered that the district court found: "that tainted evidence, evidence for which the defendant received both use and transactional immunity, was presented before the grand jury which returned the [tax evasion] indictment against him."

The majority fears that if the government is required to abide by its contract, a pandora's box will be opened where federal prosecutors will immunize criminals from being prosecuted for future crimes. That is obviously unreal. As I have explained, this case is an aberration. U.S. Attorneys seldom make oral agreements like this. We can have confidence that U.S. Attorneys will not abuse the informal method of granting immunity and presumably such agreements will be reduced to writing.

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Harvey's due process rights not to be prosecuted pursuant to the government's agreement are violated by the majority's reversal of the district court's dismissal of the tainted indictment.

APPENDIX

The following are excerpts from the magistrate's report. (Record, Vol. 3, Tab 72).

Tom Haas [Harvey's attorney] and William Kimbrough, who was at the time of the agreement the U.S. Attorney in the Southern District of Alabama, testified the deal negotiated with Harvey was that Harvey would not be prosecuted for anything about which he told the Government nor would anything he said be used against him.

* * * * * *

Q. by Leonard Sands

A. by Tom Haas

Q. What was the bargain that was ultimately struck with the two of them?

A. Once it had been understood that he might be able to supply these things, the understanding I had with Ruddy and Billy was that nothing that Jerry Harvey said to them, or any agent on the Government would ever at any time be used against Jerry Harvey.

Q. And what does that mean, "would ever be used against Jerry Harvey?

A. That he wouldn't be prosecuted on the basis of what they found out from him.

Q. What instructions or advice did you give Jerry Harvey prior to his attending this meeting at the Sheraton?

A. Well, I told him just what I just said, and I remember that Jerry was very skeptical about that. He didn't seem to trust anybody, and maybe he didn't trust me either. Really, he didn't know me; anything about me. I was a small town lawyer in a small town to him, and I don't recall who had referred him to me. I usually try to find that out, particularly in drug cases, because I don't want to get in a situation where I am getting paid by somebody else.

I know that he was skeptical. I know he didn't trust anybody, and I had to literally force him to comply. I said, "I know these people, U.S. Attorney, and Assistant U.S. Attorney." I said, "I would stake my life on their honor and veracity."

* * * * * *

Mr. Sands asked Mr. Kimbrough:

Q. In return for Harvey's furnishing information, what was he to receive?

A. I was to dismiss the indictment against him.

Q. Do you know whether or not any—

A. And I would not prosecute him for anything he said; and I would not use anything he said as a means of going beyond this agreement to try to stir up trouble for Harvey.

Q. At that time as United States Attorney, you were speaking for yourself, and Southern District of Florida?

A. I can't say that. It was certainly my understanding that somebody had touched base with South Florida who wanted the information, and I assumed, and I continued to assume that nobody would have—

I certainly would not have asked Mr. Harvey to make a total disclosure had I thought that in doing so, I, you know, turned him loose to prosecution in some other district. I have no personal knowledge of that. That is all I am saying. That is not the way we operated, I assure you. We tried to treat everybody as human beings, although we tried to put some of them in the penitentiary.

* * * * * *

THE COURT: I need to interrupt you, Mr. Sands. Mr. Kimbrough, you made the statement that you would not have prosecuted him for anything he told you about.

Now, there are all different kinds of immunities, and we have been discussing that. We have been discussing transactional immunity versus use immunity.

If in telling you about all drug-related murders about which he had knowledge, Mr. Harvey told you that he killed some-

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APPENDIX—Continued

body in Mobile, Alabama, pursuant to this agreement, and this letter, and your understanding of this, could you prosecute him for that murder?

THE WITNESS: I don't know. I probably [redacted]ouldn't have.

THE COURT: Could you use his statement or facts that he gave you in the statement in building of the murder case?

THE WITNESS: No, because it would be derived from the statement he gave.

* * * * * *

Q. by Leonard Sands

A. by Jerry Lee Harvey

Q. As a result of those conversations, was it your understanding you had an agreement with the U.S. Attorney's Office in the Southern District of Alabama?

A. I knew I did. Mr. Kimbrough, and Mr. Favre told me, and Tom Haas told me.

Q. What did they tell you your deal was? What were you supposed to do?

A. I was supposed to tell them everything I knew about drug trafficking, people involved, how it took place, what happened to the funds, how you would register airplanes fictitiously. Anything I knew from 1975, and everything I had done from '75 up to the present time.

Q. And what was the Government's obligation to you in return for your cooperation?

A. They agreed nothing I ever give them would be used against me, nor would any U.S. Attorney's office seek to prosecute me for anything; that I was just getting a clean walk, and I should stay on the Government's side and help them.

* * * * * *

The best that can be said as a summary of the evidence or statement made by Harvey to the Drug Enforcement Agents at that meeting is that Harvey told them all about his drug dealings in which he had been involved prior to his arrest in June of 1980, and including the arrest of 1980. This Court specifically finds from the facts adduced at the hearing that the defendant Harvey also divulged to the Drug Enforcement Administration his financial dealings with respect to his illegal drug deals.

HATCHETT, Circuit Judge, dissenting.

I join Judge Clark's dissent. The agreement in this case covers the subject funds.

I hasten to add that nothing is gained by encouraging the government to enter into informal agreements, the terms of which are determined through evidentiary hearings in the district court and fact-finding in the in banc court, after the accused has completed performance.

Roy LOHR and Larry Randolph, Plaintiffs-Appellees,

v.

STATE OF FLORIDA DEPARTMENT OF CORRECTIONS, et al., Defendants,

Ken Ault, Defendant-Appellant.

No. 87-5122
Non-Argument Calendar.

United States Court of Appeals, Eleventh Circuit.

April 14, 1989.

Keith C. Tischler, Parker, Skelding, Costigan, McVoy & Labasky, Tallahassee, Fla., for defendant-appellant.

Evan I. Fetterman and Salvatore Scibetta, Fetterman & Associates, North Palm Beach, Fla., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before HILL, VANCE and CLARK, Circuit Judges.

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Westlaw.

43A C.J.S. Injunctions § 281

Corpus Juris Secundum
Database updated December 2007

Injunctions
By John Bourdeau, J.D., Nicole D. Fox, J.D., John R. Kennel, J.D., of the National Legal Research Group, Charles J. Nagy, J.D., Thomas Muskus, J.D., Eric C. Surette, J.D.

IV. Subjects of Protection and Relief
H. Criminal Acts, Conspiracies, Prosecutions, and Judgments
2. Criminal Proceedings, Prosecutions, and Judgments

Topic Summary References Correlation Table

§ 281. When injunctive relief available

West's Key Number Digest

West's Key Number Digest, Injunction ⚿105(1)

There are circumstances under which the courts properly make exceptions to the general rule that equity will not interfere with criminal process by entertaining actions for injunction in advance of criminal prosecutions.

An injunction to restrain a criminal prosecution may issue where a statute authorizes such relief,[FN1] and apart from statute, there are circumstances under which courts properly make exceptions to the general rule that equity will not interfere with criminal processes by entertaining actions for injunction in advance of criminal prosecutions.[FN2] More specifically, an injunction to restrain a criminal prosecution lies where it is shown that the prosecution is for the sole purpose of unlawfully taking property, destroying the business of the plaintiff,[FN3] or will result in irreparable injury to the plaintiff,[FN4] and the plaintiff has no adequate remedy at law.[FN5] Furthermore, there must be a grave danger of impending or imminent injury to the person or property rights; a mere threat or bare fear of such injury is not sufficient.[FN6]

So long as the court has jurisdiction and the case is not moot,[FN7] the grant or denial of an injunction is a matter for the trial court in the exercise of its sound discretion according to the circumstances and exigencies of each particular case.[FN8] It is dependent on the establishment of a clear legal right to the relief sought.[FN9]

Special circumstances making injunctive relief appropriate may involve prosecution in bad faith[FN10] and the use of criminal statutes to suppress and chill constitutionally protected rights.[FN11] In a proper case, unlawful proceedings in a criminal prosecution may be restrained,[FN12] and injunctive relief may be available prior to an indictment.[FN13] The action may or should be brought by one having standing to sue,[FN14] and equity is not restricted in affording relief to one who would be subject to prosecution under the law or ordinance,[FN15] but ordinarily, one who has not been indicted, arrested, or even threatened with prosecution has no standing to bring a

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suit for injunction.[FN16]

Suit relating to same matters pending in equity.

Another exception to the general rule is that a court of equity will restrain a criminal prosecution begun while there is pending in equity a suit to try the same right between the same parties.[FN17] It has been stated that this rule is limited to cases where the parties sought to be enjoined have as plaintiffs submitted themselves to the court in the equity proceeding.[FN18] The suit must be pending in equity when the injunction is sought,[FN19] and the subject matter of the two proceedings must be identical.[FN20]

It has been broadly stated that equity will enjoin a criminal proceeding if necessary to prevent a multiplicity of suits.[FN21] Furthermore, in some cases an exception to the general rule denying injunctive relief has been made on the ground that the prosecutions sought to be enjoined were vexatious and oppressive.[FN22]

[FN1] Neb.—Webber [redacted]. City of Scottsbluff, 141 Neb. 363, 3 N.W.2d 635 (1942).

[FN2] Ga.—Sarrio [redacted]. Gwinnett County, 273 Ga. 404, 542 S.E.2d 485 (2001).

[FN3] Ark.—Billy/Dot, Inc. [redacted]. Fields, 322 Ark. 272, 908 S.W.2d 335 (1995).

Ga.—Sarrio [redacted]. Gwinnett County, 273 Ga. 404, 542 S.E.2d 485 (2001).

[FN4] U.S.—Scolaro [redacted]. District of Columbia Bd. of Elections and Ethics, 946 F. Supp. 80 (D.D.C. 1996).

Ga.—Sarrio [redacted]. Gwinnett County, 273 Ga. 404, 542 S.E.2d 485 (2001).

[FN5] U.S.—Metro Medical Supply, Inc. [redacted]. Shalala, 959 F. Supp. 799 (M.D. Tenn. 1996).

Ga.—Sarrio [redacted]. Gwinnett County, 273 Ga. 404, 542 S.E.2d 485 (2001).

[FN6] U.S.—Gersten [redacted]. Rundle, 833 F. Supp. 906 (S.D. Fla. 1993), aff'd, 56 F.3d 1389 (11th Cir. 1995).

Ga.—Sarrio [redacted]. Gwinnett County, 273 Ga. 404, 542 S.E.2d 485 (2001).

[FN7] Ark.—Dickey [redacted]. Signal Peak Enterprises, 340 Ark. 276, 9 S.W.3d 517 (2000).

Tenn.—Storey [redacted]. Nichols, 49 S.W.3d 288 (Tenn. Ct. App. 2000).

[FN8] Wyo.—Nation [redacted]. Giant Drug Co., 396 P.2d 431 (Wyo. 1964).

[FN9] N.Y.—Weiss [redacted]. Beckmann, 197 Misc. 414, 96 N.Y.S.2d 66 (Sup 1950).

[FN10] U.S.—In re Scott, 166 B.R. 779 (D. Mass. 1994).

La.—Board of Com'rs of Orleans Levee Dist. [redacted]. Connick, 654 So. 2d 1073 (La. 1995).

A.L.R. Library

Proceedings for injunction or restraining order as basis of malicious prosecution action, 70 A.L.R. 3d 536.

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[FN11] U.S.—Metro Medical Supply, Inc. [redacted]. Shalala, 959 F. Supp. 799 (M.D. Tenn. 1996).

[FN12] U.S.—U.S. [redacted]. Hasiwar, 299 F. Supp. 1053 (S.D. N.Y. 1969).

[FN13] N.Y.—Simonson [redacted]. Cahn, 33 A.D.2d 790, 307 N.Y.S.2d 581 (2d Dep't 1969), order aff'd, 27 N.Y.2d 1, 313 N.Y.S.2d 97, 261 N.E.2d 246 (1970).

[FN14] U.S.—Younger [redacted]. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

[FN15] U.S.—New Am. Library of World Literature [redacted]. Allen, 114 F. Supp. 823, 52 Ohio Op. 289, 67 Ohio L. Abs. 143 (N.D. Ohio 1953).

[FN16] U.S.—Alga, Inc. [redacted]. Crosland, 327 F. Supp. 1264 (M.D. Ala. 1971), order aff'd, 459 F.2d 1038 (5th Cir. 1972).

[FN17] U.S.—Packard [redacted]. Banton, 264 U.S. 140, 44 S. Ct. 257, 68 L. Ed. 596 (1924).

[FN18] Fla.—Gulf Theatres [redacted]. State ex rel. Ferguson, 133 Fla. 634, 182 So. 842 (1938).

[FN19] U.S.—Harkrader [redacted]. Wadley, 172 U.S. 148, 19 S. Ct. 119, 43 L. Ed. 399 (1898).

[FN20] Fla.—Coleman [redacted]. Greene, 136 Fla. 276, 186 So. 541 (1939).

[FN21] Pa.—Pennsylvania Soc. for Prevention of Cruelty to Animals [redacted]. Bravo Enterprises, Inc., 428 Pa. 350, 237 A.2d 342 (1968).

[FN22] Ala.—Quinnelly [redacted]. City of Prichard, 292 Ala. 178, 291 So. 2d 295 (1974).

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CJS INJUNCTION § 281

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Count Three is ripe for federal adjudication, and the District Court's dismissal on this ground will be reversed. We reserve judgment on whether a claim upon which relief can be granted has been stated. The facial SDP and EPC challenges to the Ordinance and the SDP challenge to appellees' obstructive course of conduct prior to the enactment of the Ordinance are ripe for review. The complaint states a facial SDP claim upon which relief can be granted as to the Ordinance, and a SDP claim as to appellees' obstructive course of conduct, and the order of the District Court dismissing those claims on this ground will be reversed. The complaint fails to state an EPC claim, and the order of the District Court dismissing on this ground will be affirmed. To the extent that the District Court dismissed the SDP, EPC, Takings and Tortious Interference claims (Counts One through Four) against the individual defendants on the ground of absolute legislative immunity, the order of the District Court will be vacated, and we will remand for findings consistent with this opinion. To the extent the District Court accorded the individual defendants legislative immunity as to appellants' SDP claim attacking defendants' pre-Ordinance conduct under *Blanche Road*, the order of the District Court will be reversed. The order of the District Court granting summary judgment on Counts Four and Seven will be affirmed as to all appellees, except Stern, with respect to whom the order will be reversed. The District Court's dismissal of Count Five on statute of limitations grounds will be affirmed,[5] and the order dismissing Count Six will be vacated. The cross-appeal will be dismissed.

In sum, the following claims survive: a substantive due process facial challenge to the Ordinance; a substantive due process challenge to appellees' obstructive course of conduct leading up to the enactment of the Ordinance; a Fifth Amendment Just Compensation Takings challenge to the face of the Ordinance; breach of the implied covenant of good faith and fair dealing; and the tortious interference and civil conspiracy claims, but only against Stern.

5. Appellants have not argued that the dismissal on Count Five should be reversed.

STOLT–NIELSEN, S.A.; Stolt–Nielsen Transportation Group Ltd.; Richard B. Wingfield

v.

UNITED STATES of America Appellant.

No. 05–1480.

United States Court of Appeals, Third Circuit.

Argued Sept. 30, 2005.

Filed March 23, 2006.

As Amended May 16, 2006.

Background: Company and officer, faced with possible criminal charges for antitrust violations, brought action to enforce terms of immunity agreement under United States Department of Justice's (DOJ's) corporate leniency program. The United States District Court for the Eastern District of Pennsylvania, Timothy J. Savage, J., 352 F.Supp.2d 553, enjoined prosecution, and government appealed.

Holding: The Court of Appeals, Ambro, Circuit Judge, held that, on issue of first impression in circuit, district court lacked authority to enjoin executive branch from filing indictment.

Reversed and remanded.

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1. Federal Courts ⇐754.1, 814.1

District court's grant or denial of permanent injunction is reviewed for abuse of discretion, while its underlying legal conclusions are reviewed without deference.

2. Federal Courts ⇐776

District court's determination of whether potential criminal defendant's cooperation agreement with government has been breached is legal conclusion, reviewed de novo.

3. Injunction ⇐105(1)

Although court generally lacks jurisdiction to enjoin criminal prosecution, exception exists when necessary to avoid chilling effect on First Amendment or similar constitutional rights. U.S.C.A. Const. Amend. 1.

4. Criminal Law ⇐42.5(3), 273.1(2)

Government must adhere strictly to terms of agreements made with defendants, including plea, cooperation, and immunity agreements, to extent they require defendants to sacrifice constitutional rights.

5. Injunction ⇐105(1)

District court lacked authority to enjoin indictment of corporation and officer for antitrust violations, despite claim that indictment would violate terms of immunity agreement entered into as part of government's corporate leniency program; though agreement may have been defense to conviction, it was not defense to indictment.

6. Equity ⇐46

Suit in equity does not lie where there is plain, adequate and complete remedy at law that is as complete, practical and efficient as that which equity could afford.

R. Hewitt Pate, Assistant Attorney General, Scott D. Hammond, Makan Delrahim, Deputy Assistant Attorneys General, John P. Fonte, John J. Powers, III, (Argued), United States Department of Justice, Antitrust Division, Washington, D.C., Robert E. Connolly, Antonia R. Hill, Wendy B. Norman, Kimberly Justice, Richard S. Rosenberg, U.S. Department of Justice, Philadelphia, PA, for Appellant.

Ian M. Comisky, Matthew D. Lee, Blank Rome LLP, Philadelphia, PA, [redacted] J. Terwillinger III, John M. Gidley, Christopher M. Curran, (Argued), Lucius B. Lau, White & Case LLP, Washington, D.C., for Appellee Stolt–Nielsen S.A. and Stolt–Nielsen Transportation Group Ltd.

Roberta D. Liebenberg, Allen D. Black, (Argued), Gerard A. Dever, Fine, Kaplan & Black, Philadelphia, PA, James A. Backstrom, Jr., Philadelphia, PA, for Appellee Richard B. Wingfield.

Before ALITO * and AMBRO, Circuit Judges and RESTANI,** Judge.

AMBRO, Circuit Judge.

This case raises a significant constitutional question of first impression in this Circuit: whether federal courts have authority, consistent with the separation of powers, to enjoin the executive branch from filing an indictment. Although federal courts have this authority in narrow circumstances, we conclude that this is not

* Then Judge, now Justice, Alito heard oral argument in this case but was elevated to the United States Supreme Court on January 31, 2006. This opinion is filed by a quorum of the panel. 28 U.S.C. § 46(d).

** Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

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such a case and therefore reverse the District Court's judgment to the contrary.

I.

A. Background

Appellee Stolt–Nielsen, S.A., through its subsidiary Stolt–Nielsen Transportation Group Ltd. (collectively "Stolt–Nielsen" or the "Company"), is a leading supplier of parcel tanker shipping services. In March 2002, Stolt–Nielsen's general counsel, Paul O'Brien, resigned. According to a complaint O'Brien filed against Stolt–Nielsen in Connecticut Superior Court in November 2002, and a subsequent article in *The Wall Street Journal*, O'Brien advised his superiors of illegal collusive trading practices between Stolt–Nielsen and two of its competitors, and resigned after the Company failed to take action to resolve the problem. On receiving O'Brien's November 2002 complaint, Stolt–Nielsen hired John Nannes, a former Deputy Assistant Attorney General in the Antitrust Division at the U.S. Department of Justice, to conduct an internal investigation of possible antitrust violations by the Company and advise it regarding any criminal liability.

On November 22, 2002, Nannes met with the chairman of Stolt–Nielsen's tanker division, Samuel Cooperman. Cooperman informed Nannes that O'Brien "rais[ed] some antitrust concerns" in early 2002, and that in response Stolt–Nielsen revised its antitrust compliance policy and disseminated it to its employees and competitors. Cooperman also told Nannes that he believed an internal investigation would demonstrate that the Company was in violation of federal antitrust laws and asked Nannes about the possibility of leniency from the Department of Justice. With Cooperman's permission, Nannes spoke with an Antitrust Division official later that day to inquire about amnesty if Stolt–Nielsen were to admit its violations, and the Government informed him that an investigation had already begun.

Specifically, Nannes inquired about possible protection for Stolt–Nielsen and its officers under the Antitrust Division's Corporate Leniency Policy. Under this Policy, the Government agrees "not [to] charg[e] a firm criminally for the activity being reported" if (in the case of an applicant who comes forward after an investigation has begun) seven conditions are met: (1) the applicant is the first to report the illegal activity; (2) the Government does not, at the time the applicant comes forward, have enough information to sustain a conviction; (3) the applicant, "upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity"; (4) the applicant's report is made "with candor and completeness and provides full, continuing and complete cooperation" with the Government's investigation; (5) the applicant confesses to illegal anticompetitive conduct as a corporation and not merely through individual confessions by corporate officers; (6) the applicant makes restitution where possible; and (7) the Government determines that granting leniency to the applicant would "not be unfair to others." The officers and directors of the corporation who assist with the investigation are considered for immunity from prosecution on the same basis as if they had come forward individually.

B. *The Conditional Leniency Agreement*

The Government informed Nannes that Stolt–Nielsen would not be eligible for amnesty under the Corporate Leniency Policy if O'Brien's departure was involuntary and due to his exposure of the Company's antitrust violations. Nannes assured the Government that O'Brien left voluntarily and detailed the changes to the Company's

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antitrust policy that were implemented in response to O'Brien's concerns. During the ensuing investigation, Nannes learned that between 1998 and 2001 a Stolt–Nielsen executive, Andrew Pickering, exchanged customer allocation lists with two of Stolt–Nielsen's competitors, presumably for the purpose of apportioning customers among the companies and restraining competition. In January 2003, Pickering's successor, appellee Richard Wingfield, provided Nannes with four such lists, which confirmed that Stolt–Nielsen had indeed engaged in illegal anticompetitive behavior. Nannes promptly turned these lists over to the Government, which entered into a Conditional Leniency Agreement (the "Agreement") with Stolt–Nielsen on January 15, 2003.

Under the terms of the Agreement, the Government agreed "not to bring any criminal prosecution against [Stolt–Nielsen] for any act or offense it may have committed prior to the date of this [Agreement] in connection with the anticompetitive activity being reported." This promise was, of course, subject to Stolt–Nielsen's strict compliance with the aforementioned conditions, "[s]ubject to verification [by the Government] and subject to [Stolt–Nielsen's] full, continuing and complete cooperation." The Agreement further stated:

> If the Antitrust Division at any time determines that [Stolt–Nielsen] has violated this Agreement, [it] shall be void.... Should the Antitrust Division revoke the conditional acceptance of [Stolt–Nielsen] into the Corporate Leniency Program, the Antitrust Division may thereafter initiate a criminal prosecution against [Stolt–Nielsen], without limitation. Should such a prosecution be initiated, any documentary or other information provided by [Stolt–Nielsen], as well as any statements or other information provided by any current or former director, officer, or employee of [Stolt–Nielsen] to the Antitrust Division pursuant to this Agreement, may be used against Stolt–Nielsen in any such prosecution.

The Agreement also provided that the Government would not prosecute officers and directors of the Company who "admit their knowledge of, or participation in, and fully and truthfully cooperate with the Antitrust Division in its investigation of the anticompetitive activity being reported." Specifically, that cooperation entailed: (1) producing all documents and records requested by the Government; (2) being available for Government interviews; (3) "responding fully and truthfully to all inquiries of the [Government] ... without falsely implicating any person or intentionally withholding any information"; (4) voluntarily providing any information or materials not requested by the Government that were nonetheless relevant to the investigation; and (5) testifying under oath when asked by the Government. It concluded with a standard integration clause: "This letter constitutes the entire agreement between the [parties], and supersedes all prior understandings, if any, whether oral or written, relating to the subject matter herein."

Using the information provided by Stolt–Nielsen and its executives (including Wingfield), the Government secured guilty pleas from Stolt–Nielsen's co-conspirators, resulting in prison sentences for individual executives at those companies and fines totaling $62 million.

C. *The Government Terminates the Agreement*

In the weeks following execution of the Agreement, the Government's investigation revealed that Stolt–Nielsen's participation in the conspiracy persisted for

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several months after O'Brien raised his concerns to Cooperman in early 2002. The Government concluded that Stolt-Nielsen, and Wingfield in particular, continued to collude unlawfully with competitors until November 2002. Based on this information, the Government informed Nannes on April 8, 2003 that it was suspending Stolt-Nielsen's obligations under the Agreement and considering withdrawing the grant of conditional leniency entirely because the Company did not take "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," as required by the Agreement. One of Wingfield's subordinates, Bjorn Jansen, then admitted that the anticompetitive agreement between Stolt-Nielsen and its competitors was still in place in the fall of 2002, despite having told Nannes that such conduct ceased in March 2002 once the Company learned of O'Brien's allegations and issued its new antitrust policy.

In June 2003, the Government concluded that Wingfield had not fulfilled his obligations under the Agreement because he never informed the Government that his unlawful communications with Stolt-Nielsen's competitors did not cease in March 2002 when Stolt-Nielsen issued its new antitrust policy. On June 24, 2003, the Government charged Wingfield by criminal complaint with violating the Sherman Act, 15 U.S.C. § 1. The Government withdrew its grant of conditional leniency to Stolt-Nielsen on March 2, 2004, and announced that it intended to indict the Company and Wingfield for violations of the Sherman Act.[1]

D. *District Court Proceedings*

Shortly before the Government revoked Stolt-Nielsen's conditional leniency, the Company and Wingfield filed complaints in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of the Agreement and an injunction preventing the Government from filing indictments against them. The Government agreed to postpone its indictments of both parties pending the District Court's consideration of the complaints.

The District Court bifurcated the proceedings into two phases. In Phase One, the Court considered whether Stolt-Nielsen's alleged conduct between March and November 2002 violated the terms of the Agreement. If so, Phase Two would determine whether the conduct actually occurred. During the Phase One proceedings, the District Court consolidated consideration of Stolt-Nielsen's and Wingfield's requests for preliminary injunctions with the trial on the merits, and heard testimony from Nannes and James Griffin, a Deputy Assistant Attorney General in the Antitrust Division at the Department of Justice.

In January 2005, the District Court granted judgment in favor of Stolt-Nielsen and Wingfield and permanently enjoined the Government from indicting either of them for violations of the Sherman Act. *See Stolt-Nielsen S.A. v. United States*, 352 F.Supp.2d 553 (E.D.Pa.2005). The Court concluded that the Government could not unilaterally rescind the Agreement without a judicial determination that Stolt-Nielsen and Wingfield breached it,

1. Although the Government "charged" Wingfield by criminal complaint in June 2003, it could not prosecute him without an indictment. *See* 1 Charles Alan Wright, *Fed. Practice & Procedure* § 121, at 518 (3d ed. 1999) ("Although a criminal proceeding may be instituted by a complaint, this only permits issuance of a warrant for the arrest of the offender, and he cannot be tried unless an indictment or information, as the case may require, is brought against him.").

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an issue appropriate for consideration before indictment "because if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequences." *Id.* at 560. The Court further found that the Agreement did not specify a discovery date and instead granted amnesty for activity before January 15, 2003, the date on which it was signed. Indeed, it found that "the date when [Stolt–Nielsen] ended its participation [in the conspiracy] was never clearly established," *id.* at 562 n. 10, and therefore, in light of the Agreement's integration clause, "DOJ, especially because it drafted the agreement, cannot depend upon a tacit understanding of what it contends was meant [to be the discovery date] but was not memorialized in the integrated agreement." *Id.* at 562. The Court concluded:

> The agreement immunizes [Stolt–Nielsen] from prosecution for activity prior to January 15, 2003. Now DOJ contends the activity had to have stopped at an earlier unspecified date that is not set forth in the agreement. Had it wanted to fix the date sometime before January 15, 2003, it could have replaced the words "to the date of this letter" with the earlier date it now contends the parties contemplated.
>
> . . . [The Government's] goals [in concluding the Agreement with Stolt–Nielsen] were to pursue [Stolt–Nielsen's] coconspirators and break up the conspiracy. It got what it had bargained for in the agreement. . . . Now that it has received the benefit of the bargain, DOJ cannot prosecute the party that incriminated itself when it delivered the evidence DOJ used to accomplish its goals.

Id.

E. *Appeal*

On appeal, the Government contends that the District Court erred in two respects. First, it argues that federal courts lack jurisdiction to enjoin the executive branch from filing an indictment. Second, it asserts that the District Court erred in holding that Stolt–Nielsen's and Wingfield's actions between March and November 2002 did not violate the terms of the Agreement. For the reasons that follow, the District Court's judgment is reversed and the case remanded to that Court so that it may dismiss the appellees' complaints.[2]

II.

[1, 2] We review a District Court's grant or denial of a permanent injunction for abuse of discretion, *United States v. Bell*, 414 F.3d 474, 478 (3d Cir.2005), but exercise plenary review over the District Court's underlying legal conclusions. *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 255–56 (3d Cir.2003). A District Court's determination whether a cooperation agreement has been breached is a legal conclusion. *United States v. Baird*, 218 F.3d 221, 229 (3d Cir.2000). All findings of fact are reviewed for clear error. *See Bell*, 414 F.3d at 478 (reviewing findings of fact related to a permanent injunction for clear error); *Baird*, 218 F.3d at 229 (reviewing findings of fact related to a cooperation agreement for clear error).

2. The District Court had jurisdiction over this case under 28 U.S.C. § 1331, as it is a civil action arising under the laws of the United States. Our jurisdiction arises under 28 U.S.C. § 1291, since the Government filed a timely notice of appeal from a final decision of the District Court.

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III.

[3] The Supreme Court has observed that the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case," *United States v. Nixon*, 418 U.S. 683, 693, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), and the Government therefore argues that courts lack jurisdiction to enjoin a criminal prosecution. *See United States v. Cox*, 342 F.2d 167, 171 (5th Cir.1965) (*en banc*) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

There is an exception to this general rule, however, in order to avoid a chilling effect on constitutional rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 486–87, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (recognizing that the threat of criminal prosecution creates the potential for a serious chill upon First Amendment rights); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 98–99, 69 S.Ct. 968, 93 L.Ed. 1231 (1949) (recognizing that the threat of prosecution may deny fishermen the right to earn a livelihood); *Truax v. Raich*, 239 U.S. 33, 38–39, 36 S.Ct. 7, 60 L.Ed. 131 (1915) (recognizing that the threat of prosecution may lead to an unconstitutional denial of the right to earn a livelihood and to continue employment). The Supreme Court has typically applied the exception in the First Amendment context, and in such cases has recognized,

> [a] criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms.... The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases.... [W]e have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.

Dombrowski, 380 U.S. at 486–87, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *see also Ashcroft v. ACLU*, 542 U.S. 656, 670–71, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (upholding preliminary injunction against criminal enforcement of the Child Online Protection Act because, *inter alia*, "[w]here a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial").

[4] It is also well established that the Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation, and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *United States v. Hodge*, 412 F.3d 479, 485 (3d Cir.2005) ("The government must adhere strictly to the terms of the bargains it strikes with defendants. Because defendants entering pleas forfeit a number of constitutional rights, courts are compelled to scrutinize closely the promise made by the government in order to determine whether it has been performed." (citation and internal quotation marks omitted)).

Therefore, although the Government is certainly correct that there is no free-ranging jurisdiction on the part of courts to enjoin criminal prosecutions, that authority does exist in limited situations where the mere threat of prosecution would inhibit the exercise of constitutional freedoms. Federal courts also have jurisdiction to consider, and hold the Government to, the terms of agreements it makes with defendants. The question thus becomes whether, even when there is no risk of a chilling effect on constitutional rights, the existence of an immunity agreement provides federal courts with authority to

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enjoin a federal criminal prosecution in order to avoid the filing of an indictment.

The District Court relied on a Seventh Circuit case, *United States v. Meyer*, 157 F.3d 1067 (7th Cir.1998), as authority for conducting a pre-indictment review of the Agreement before us. *See Stolt–Nielsen*, 352 F.Supp.2d at 560–61. In *Meyer*, the Seventh Circuit stated, in *dicta*, that "the preferred procedure, absent exigent circumstances, would be for the government to seek relief from its obligations under the immunity agreement prior to indictment. Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a *de minimis* inconvenience for the government to secure that determination pre-indictment." 157 F.3d at 1077.

We have no quarrel with the Seventh Circuit's observation that, in many circumstances, a pre-indictment determination of the parties' obligations under an immunity agreement might be useful. We point out, however, that no federal court (including the Seventh Circuit) has held that a pre-indictment determination is constitutionally required. Indeed, notwithstanding its *dicta* regarding the "preferred procedure," the *Meyer* Court held the defendant was constitutionally "entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement," and that this "interest" was in not being *convicted*, rather than not being *indicted*. *Id.* at 1076–77.[3] As the Court noted, "a post-indictment evidentiary hearing on the defendant's alleged breach was sufficient to satisfy due process." *Id.* at 1076 (citing *United States v. Verrusio*, 803 F.2d 885, 889 (7th Cir.1986)).

[5] Other immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have likewise been construed to protect the defendant against conviction rather than indictment and trial. *See, e.g., Heike v. United States*, 217 U.S. 423, 431, 30 S.Ct. 539, 54 L.Ed. 821 (1910) (construing the Sherman Act's immunity provision, which protected a testifying witness from being "prosecuted," *see* Act of Feb. 25, 1903, ch. 755, § 1, 32 Stat. 854, 904 (repealed 1970), "not ... to secure to a person making such a plea immunity from prosecution, but to provide him with a shield against successful prosecution, available to him as a defense"); *United States v. Bailey*, 34 F.3d 683, 690–91 (8th Cir.1994) (holding that an agreement "not to prosecute" protected the defendant from "the inherent risk of conviction and punishment as a result of the trial, not the trial itself"); *United States v. Bird*, 709 F.2d 388, 392 (5th Cir.1983) ("While the agreement is phrased in terms of nonprosecution, its essence is a promise of immunity. [The defendant's] immunity from punishment will not be lost simply because she is forced to stand trial.").

This distinction is grounded in the understanding that simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather "one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 84 L.Ed. 783 (1940); *see Deaver v. Seymour*, 822 F.2d 66, 69 (D.C.Cir.1987) ("Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved.").[4] As the District of Columbia

3. In keeping with the case law discussed below, the Seventh Circuit reached this conclusion despite the fact that the immunity agreement before it stated that the Government would not "charge" the defendant. *Meyer*, 157 F.3d at 1077.

4. We do not address in this opinion those circumstances in which equity might serve to enjoin an *ultra vires* prosecution brought in bad faith. The Supreme Court has only approved federal injunctions against *state* criminal proceedings on that basis. *See Younger v. Harris*, 401 U.S. 37, 55, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (noting that, although "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunc-

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Circuit noted in *Deaver*, in the absence of a chilling effect on constitutional rights, the adversary system "afford[s] defendants, after indictment, a federal forum in which to assert their defenses—including those based on the Constitution. Because these defendants are already guaranteed access to a federal court, it is not surprising that subjects of federal investigation have never gained injunctive relief against federal prosecutors." 822 F.2d at 69–70.[5]

Although this interpretation of agreements "not to prosecute" may seem counterintuitive, it comports with the federal courts' general reluctance to recognize a right not to be indicted or tried in the absence of an express constitutional (or perhaps statutory) command. In the context of interlocutory appeals challenging the Government's authority to proceed with a prosecution, for example, the Supreme Court has allowed those appeals only in very limited circumstances. For example, the Double Jeopardy Clause, *see* U.S. Const. amend. [redacted] ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb ...."), protects interests that are "wholly unrelated to the propriety of any subsequent conviction," in that it provides a "guarantee against being twice put to *trial* for the same offense." *Abney v. United States*, 431 U.S. 651, 661, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) (emphasis added). Because the prohibition against double jeopardy affords a defendant the right to "contest[ ] the very authority of the Government to hale him into court to face

tion against [a state's] good-faith attempts to enforce it," a "showing of bad faith [or] harassment" might "justify federal intervention"); *see also* Howard W. Brill, *Equity and the Criminal Law*, 2000 Ark. L. Notes 1, 3–4 (noting that state courts have sometimes used injunctions to prevent bad-faith prosecutions, such as those brought solely to "harass and to retaliate for the exercise of constitutional rights," or where the prosecutor charges conduct that is not illegal). As our precedent makes clear, however, in the absence of a state prosecution, federal-state abstention doctrine is irrelevant and *Younger* does not apply. *Pic–A–State Pa., Inc.* [redacted] *Reno*, 76 F.3d 1294, 1300 (3d Cir.1996). Moreover, even if the principles of *Younger* or the willingness of certain state courts to entertain injunctions against bad-faith or illegal prosecutions could be applied to a federal prosecution, we perceive no bad faith on the part of the Government in this case; rather, the parties are engaged merely in a good-faith dispute over the meaning of the Agreement.

5. We note that the District Court's finding that Stolt–Nielsen and Wingfield would be irreparably harmed by an indictment does not bring this case within the ambit of the cases in which injunctions against indictment and trial have been approved. Even assuming that irreparable harm is a factor that may properly be considered in deciding upon a permanent (as opposed to preliminary) injunction—which is a matter of some tension in our case law, *compare Chao v. Rothermel*, 327 F.3d 223, 228 (3d Cir.2003) (stating that a permanent injunction may be granted "where the moving party has demonstrated that: (1) the exercise of jurisdiction is appropriate; (2) the moving party has actually succeeded on the merits of its claim; and (3) the 'balance of equities' favors granting injunctive relief"), *and ACLU of N.J.* [redacted] *Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 nn. 2–3 (3d Cir.1996) (*en banc*) (noting that a *preliminary* injunction requires consideration of, *inter alia*, irreparable injury, while a *permanent* injunction merely requires consideration of whether "the plaintiff has actually succeeded on the merits," and, if so, whether an injunction is an "appropriate remedy" (internal quotation marks omitted)), *with Shields* [redacted] *Zuccarini*, 254 F.3d 476, 482 (3d Cir.2001) (stating that a court may grant a permanent injunction if it finds, *inter alia*, that "the moving party will be irreparably injured by the denial of injunctive relief" (citing *Black Horse Pike*, 84 F.3d at 1477 nn. 2–3))—we note that, as stated above, other courts have not accepted the argument that the unpleasantness of an indictment brought in good faith constitutes an injury that may be remedied by a pre-indictment injunction, and neither have we.

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trial on the charge against him," it necessitates an exception to the "firm congressional policy against interlocutory or 'piecemeal' appeals." *Id.* at 656, 659, 97 S.Ct. 2034. Likewise, the Speech and Debate Clause, *see* U.S. Const. art. I, § 6, cl. 1 ("[F]or any speech or debate in either House, [members of Congress] shall not be questioned in any other Place."), has been construed "to protect Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves," thus allowing interlocutory appeals from denials of claims of immunity under that Clause. *Helstoski v. Meanor,* 442 U.S. 500, 508, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979) (internal quotation marks omitted).

Our case is not an interlocutory appeal, but the Supreme Court's cases in that field are instructive because they reinforce the narrowness of a defendant's ability to challenge the Government's decision to pursue a prosecution. Just as the authority to enjoin criminal enforcement of a law regulating speech is grounded in the overriding need to avoid a chilling effect on the exercise of core constitutional rights, so too does the right not to be prosecuted recognized in *Abney* and *Helstoski* stem from express textual commands in the Constitution that prohibit any interference with the rights against double jeopardy or of members of Congress to speak freely in legislative session.

In other contexts, however, courts have refused to allow interlocutory appeals to stop prosecutions. *See, e.g., United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 268, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (*per curiam*) (holding that a vindictive prosecution claim may not be raised in an interlocutory appeal to stop an ongoing prosecution, but rather may only be raised after the defendant has been convicted, because "reversal of the conviction and . . . the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused"); *Parr v. United States,* 351 U.S. 513, 519, 76 S.Ct. 912, 100 L.Ed. 1377 (1956) (holding that the mere fact a defendant would have to "hazard a trial" in one venue before challenging the District Court's order transferring his case from a different venue did not warrant an interlocutory appeal); *cf. United States v. P.H.E., Inc.,* 965 F.2d 848, 855 (10th Cir. 1992) (noting that, in comparing the vindictive prosecution claim in *Hollywood Motor Car* to a vindictive prosecution claim based on the defendants' dissemination of constitutionally protected speech, "[t]he wrong alleged is similar, but the right sought to be vindicated is not" because the "procedural rule [at issue in *Hollywood Motor Car*] raises concerns distinct from and less pressing than the courts' obligation to protect the First Amendment right not to be subjected to a pretextual prosecution"). Indeed, when a district court rejects prior to trial a defendant's contention that an immunity agreement bars his conviction, the defendant may not avail himself of an interlocutory appeal challenging that decision; rather, "the availability of dismissal after final judgment will adequately protect and secure for the defendant the benefit of his bargain under the nonprosecution agreement if he is entitled to it." *Bailey,* 34 F.3d at 691; *see Bird,* 709 F.2d at 392 (same).

Here, Stolt–Nielsen and Wingfield may interpose the Agreement (as a defense to conviction) in a pre-trial motion. *See, e.g., Meyer,* 157 F.3d at 1077 ("In accordance with due process, [the defendant] was entitled to a judicial determination that he had breached the agreement before being subjected to the risk of conviction. The district court's pretrial [but post-indictment] evidentiary hearing satisfied this require-

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ment.").[6] But their contention that the immunity they purportedly received under the Agreement precludes an indictment in the first place is belied by precedent, and we see no compelling reason to reach a different result in this case.

* * * * * *

[6] "[A] suit in equity does not lie where there is a plain, adequate and complete remedy at law ... [that is] as complete, practical and efficient as that which equity could afford." *Terrace v. Thompson*, 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255 (1923). Here, Stolt–Nielsen and Wingfield have a practical and efficient—and indeed complete—legal remedy available to them, *i.e.*, access to a federal forum post-indictment in which they may assert the Agreement as a defense. Separation-of-power concerns thus counsel against using the extraordinary remedy of enjoining the Government from filing the indictments. Although courts have carved out a narrow exception to this rule in those cases in which the very act of filing an indictment may chill constitutional rights, this case does not implicate that concern. Instead, we are guided by other cases from the Supreme Court and Courts of Appeals that lead us to conclude that non-prosecution agreements may not form the basis for enjoining indictments before they issue.

In this context, we conclude that the District Court lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of Stolt–Nielsen and Wingfield. The judgment is therefore reversed and the case remanded with the instruction that the District Court dismiss their complaints with prejudice.[7]

6. In our view, the pre-trial determination approved by the Seventh Circuit in *Meyer* does not conflict with the observations of the Fifth and Eighth Circuits that non-prosecution agreements of the sort involved in this case protect against the risk of conviction and punishment, not trial. *See Bailey*, 34 F.3d at 691; *Bird*, 709 F.2d at 392. For one thing, *Bailey* and *Bird* concerned attempted interlocutory appeals from district court denials of post-indictment claims that immunity agreements barred conviction, and as such were not concerned with the timing of the claims in the district court. In any event, it is not in the interest of defendants or the Government, once an indictment has been issued, to proceed with a trial before determining whether an immunity agreement bars conviction. We therefore agree with the Seventh Circuit that a pre-trial hearing is appropriate in these circumstances. We note, however, that this timing is not essential, and a defendant may raise an immunity agreement as a defense during the trial.

7. Because we conclude that the District Court lacked the power to enjoin the filing of indictments in this case, we do not consider, at this stage, the Government's alternative argument that the District Court inappropriately concluded that Stolt–Nielsen's and Wingfield's actions between March and November 2002 did not violate the terms of the Agreement. As stated, the District Court's lack of authority compels us to reverse the judgment and remand to that Court so that it may dismiss the complaints. Because the judgment is reversed, it lacks preclusive effect. *See, e.g., Joseph A. ex rel. Wolfe ▌ Ingram*, 275 F.3d 1253, 1266 (10th Cir.2002) ("A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." (internal quotation marks omitted)). Therefore, if the appellees assert the Agreement as a defense after they are indicted, the District Court must consider the Agreement anew and determine the date on which Stolt–Nielsen discovered its anticompetitive conduct, the Company's and Wingfield's subsequent actions, and whether, in light of those actions, Stolt–Nielsen complied with its obligation under the Agreement to take "prompt and effective action to termi-

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Earle B. GREGORY; Ken Blinko; Betty C. Coley; Vicki Grainger; Ethel E. Graves; Becky Halsall; John S. Halsall, III; Jerry F. McDaniel; Veronica T. McDaniel; Laverne McKenzie; Marianne McKenzie; Nathan J. Neely; Zevie H. Neely; Sulina Prather; Kathryn Roddey; Gina Tibbs; John A. Tibbs; John C. Tibbs; Brenda D. Watts; Gerald D. Watts; C. Ann Williams; Henry M. Williams, Jr.; Wesley L. Williams, Jr.; Grant [redacted]; Tom Moore; Anna Nunnery; Charles Shope; Penelope Shope; Kathy Annette Wood; Sam Jones Wood; Ruth Ann [redacted], Plaintiffs–Appellees,

[redacted]

FINOVA CAPITAL CORPORATION, Defendant–Appellant.

No. 05–2118.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 2, 2006.

Decided March 14, 2006.

Background: Noteholders filed class action securities fraud suit against now-bankrupt issuer's principal lender. The United States District Court for the District of South Carolina, G. Ross Anderson, Jr., J., certified class, and lender appealed.

Holding: The Court of Appeals, Luttig, Circuit Judge, held that class action was not superior method for fair and efficient adjudication of controversy.

Reversed.

King, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Federal Courts ⇐817

District court's class certification decision is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2. Federal Civil Procedure ⇐172

Party seeking class certification bears burden of proving entitlement to same. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3. Federal Civil Procedure ⇐187

Class certification of noteholders securities fraud claims against now-bankrupt issuer's principal lender was abuse of discretion, absent showing that class action was superior method for fair and efficient adjudication of controversy; same claims were already pending against lender in bankruptcy adversary proceeding. Fed. Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

ARGUED: Daniel P. Shapiro, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd, Chicago, Illinois, for Appellant. Gilbert Scott Bagnell, Bagnell & Eason, L.L.C., Columbia, South Carolina, for Appellees. **ON BRIEF:** Elizabeth Van Doren Gray, Allen J. Barnes, Sowell, Gray, Stepp & Laffitte, P.L.L.C., Columbia, South Carolina; Steven A. Levy, Andrew R. Cardonick, Goldberg, Kohn, Bell, Black, Rosenbloom & Moritz, Ltd, Chicago, Illinois, for Appellant. Chad McGowan, S. Randall Hood, McGowan, Hood, Felder & Johnson, Rock Hill, South Carolina; Randall M. Eason, Bagnell & Eason, L.L.C., Lancaster, South Carolina, for Appellees.

Before WIDENER, LUTTIG, and KING, Circuit Judges.

nate its part in the anticompetitive activity being reported upon discovery of the activity."

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Westlaw.

Not Reported in F.Supp.2d, 2007 WL 1113646 (M.D.Pa.)

(Cite as: 2007 WL 1113646 (M.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.
Michael Curtis REYNOLDS, Petitioner
v.
John GURGANUS, Prosecutor, Respondent.
Civil No. 4:CV-07-675.

April 12, 2007.
Michael Curtis Reynolds, Scranton, PA, pro se.

Dennis Pfannenschmidt, U.S. Attorney's Office, Harrisburg, PA, for Respondent.

MEMORANDUM

JAMES F. McCLURE, JR., United States District Judge.

Background

***1** Michael Curtis Reynolds ("Petitioner"), an inmate presently confined in the Lackawanna County Prison, Scranton, Pennsylvania initiated this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. Reynolds' petition is accompanied by an *in forma pauperis application.* For the reasons set forth below, Reynolds' petition will be dismissed as meritless.

Named as sole Respondent is Assistant United States Attorney John Gurganus of the Middle District of Pennsylvania. This is the latest in a series of civil rights complaints and habeas corpus petitions filed by Reynolds which challenge the legality of his ongoing federal criminal prosecution in this district. *See United States v. Reynolds,* Case No. 3:05-CR-493. AUSA Gurganus is the prosecuting attorney. In his petition, Reynolds reasserts his previous claims that there has been a violation of his speedy trial rights and perjured testimony was presented before the grand jury. As relief, Reynolds seeks reversal of his federal criminal charges and release.

Discussion

Rule 4 ("Preliminary Consideration by the Judge") of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (1977) (applicable to § 2241 petitions under Rule 1(b)) permits summary dismissal of a § 2241 habeas corpus petition.. *See, e.g., Patton v. Fenton,* 491 F.Supp. 156, 158-59 (M.D.Pa.1979). A judge may enter summary dismissal "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Dismissal under Rule 4 is appropriate "when the petition is frivolous, or obviously lacking in merit, or where ... the necessary facts can be determined from the petition itself...." *Allen v. Perini,* 26 Ohio Misc. 149, 424 F.2d 134, 141 (6th Cir.), *cert. denied,* 400 U.S. 906, 91 S.Ct. 147, 27 L.Ed.2d 143 (1970). *Accord Love v. Butler,* 952 F.2d 10, 15 (1 st Cir.1991).

As repeatedly noted by this Court, Reynolds has not yet been convicted or even tried of the federal criminal offenses underlying this action. [FN1] The Court of appeals for the Third circuit has observed that, "**simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather one of the painful obligations of citizenship**." ***Stolt-Nielsen, S .A. v. United States,* 442 F.3d 177, 184 (3d Cir.2006)** (internal citation omitted). More importantly, in ***Stolt-Nielsen,*** the Court of Appeals indicated that a habeas corpus petition should not be entertained where the applicant has an available forum in which to assert his defenses to federal criminal charges. *See* ***id.*** **at 185**; *Deaver v. Seymour,* 822 F.2d 66, 69-70 (D.C.Cir.1987). Clearly, the Petitioner has an available and adequate remedy at law. Specifically, he may assert his present claims as well as any

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additional defenses/arguments before the judge presiding over his ongoing federal criminal proceedings.

> FN1. Petitioner's federal criminal trial is presently scheduled for May 29, 2007.

***2** Furthermore, even if convicted of the pending federal criminal charges, the appropriate avenue for Reynolds to pursue his present arguments would be via a direct appeal, and if not successful therein, to then seek collateral relief under 28 U.S.C. § 2255. As Petitioner has been previously told, it is simply not appropriate for this Court to entertain his claims of speedy trial violation and perjured grand jury testimony via a pre-trial federal habeas corpus petition. If Reynolds wishes to pursue his present arguments, he must do so in his ongoing federal prosecution, or thereafter before the Court of Appeals. The petition for writ of habeas corpus will be denied. An appropriate Judgment will enter.

ORDER

In accordance with the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. Petitioner is granted leave to proceed *in forma pauperis* for the sole purpose of the filing of this action.

2. Reynolds' habeas corpus petition is DENIED.

3. The Clerk of Court is directed to close the case.

4. Based on the Court's determination herein, there is no basis for the issuance of a Certificate of Appealability.

Not Reported in F.Supp.2d, 2007 WL 1113646 (M.D.Pa.)

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173 Fed.Appx. 840, 2006 WL 592928 (C.A.D.C.)
(Cite as: 173 Fed.Appx. 840)

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Miranda [redacted]. Gonzales
C.A.D.C.,2006.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. District of Columbia Circuit Rule 28(c). (FIND CTADC Rule 28.)

United States Court of Appeals,District of Columbia Circuit.
Manuel A. MIRANDA, Appellant
v.
Alberto GONZALES, et al. Appellees.
No. 05-5066.

Feb. 16, 2006.
Rehearing En Banc Denied May 11, 2006.

Background: Plaintiff filed complaint for injunctive and declaratory relief, seeking prevention of any criminal investigation related to past conduct as Senate aide and to immunize him from future prosecution. United States District Court for District of Columbia dismissed complaint, and plaintiff appealed.

Holdings: The Court of Appeals held that:

(1) plaintiff was not entitled to injunctive relief, and

(2) denial of request for declaratory judgment was not abuse of discretion.

Affirmed.

West Headnotes

[1] Injunction [redacted] ⇦105(1)

[redacted] Injunction
212II Subjects of Protection and Relief
212II(H) Matters Relating to Criminal Acts
212k105 Criminal Prosecutions
212k105(1) k. In General. Most Cited Cases

Plaintiff was not entitled to injunctive relief to prevent criminal investigation related to past conduct as Senate aide and to immunize him from future prosecution; if indicted, plaintiff could protect his rights under First Amendment and raise defense under Speech and Debate Clause of federal criminal procedure rules. U.S.C.A. Const.Amend. 1 ; Fed.Rules Cr.Proc.Rule 12(b), 18 U.S.C.A.

[2] Declaratory Judgment 118A ⇦84

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(A) Rights in General
118Ak84 k. Criminal Laws. Most Cited Cases

Denial of request for declaratory relief with respect to complaint to prevent criminal investigation into plaintiff's past conduct as Senate aide and to immunize plaintiff from future prosecution was not abuse of discretion, absent showing of special circumstances, and given considerations of practicality and judicial administration. 28 U.S.C.A. § 2201(a); Fed.Rules Civ.Proc.Rule 57, 28 U.S.C.A.

***841** Appeal from the United States District Court for the District of Columbia.

Arthur Duncan McKey, Hanson & Molloy, Adam Augustine Carter, Law Office of Adam A. Carter, Washington, DC, for Appellant.
Neil Matthew Corwin, U.S. Attorney's Office, New York, NY, for Appellees.

Before: [redacted] and ROGERS, Circuit Judges, SILBERMAN, Senior Circuit Judge.

JUDGMENT

PER CURIAM.
****1** This case was considered on the record from

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the United States District Court for the District of Columbia and on the briefs by counsel. For the reasons set forth below it is

ORDERED that the judgment from which this appeal has been taken be affirmed. Miranda appeals the district court's dismissal of his complaint to enjoin any criminal investigation related to his past conduct as a Senate aide and to immunize him from future prosecution. It is well-settled, however, that a court will not act to restrain a criminal prosecution if the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. *See Deaver* [redacted] *Seymour,* 822 F.2d 66, 69 (D.C.Cir.1987) (citing *Younger* [redacted] *Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)). The district court correctly held that, if indicted, Miranda can protect his rights under the First Amendment and Speech or Debate Clause pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure. F.R.Crim. P. 12(b) (2005) (upon indictment, defendant may raise by motion defense based on "defects in the institution of the prosecution"). *See also Deaver,* 822 F.2d at 70 ("existence of Rule 12(b)[(3)] suggests that appellant's constitutional challenge is not to be raised in a preindictment civil injunctive action").

[1] Miranda argues that without injunctive relief his First Amendment right will be "chilled" and that the chilling constitutes a special circumstance that entitles ***842** him to injunctive relief under *Dombrowski* [redacted] *Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). As the district court pointed out, however, injunctive relief is not appropriate unless the party seeking it can demonstrate that his "First Amendment interests [are] either threatened or in fact being impaired at the time relief [is] sought." Joint Appendix 66 (quoting *Wagner* [redacted] *Taylor,* 836 F.2d 566, 576 n. 76 (D.C.Cir.1987)) (alteration in original). But Miranda himself alleges only that any infringement of his First Amendment right occurred while he was employed by the Senate. *See* Compl. ¶¶ 26-27, Joint Appendix 12-13 (alleging Senate Sergeant at Arms and Doorkeeper's investigation chilled his speech rights). *Compare Steffel* [redacted] *Thompson,* 415 U.S. 452, 461, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974).

[2] Miranda's argument that he is entitled to declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, is likewise unavailing. While it is true, as Miranda states, that an adequate remedy at law does not preclude declaratory relief if such relief is otherwise appropriate, *see* Fed.R.Civ.P. 57, the decision whether to grant that relief is squarely within the district court's discretion. *See*28 U.S.C. § 2201(a); *Wilton* [redacted] *Seven Falls Co.,* 515 U.S. 277, 287-89, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995); *Hewitt* [redacted] *Helms,* 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). The district court failed to separately set out its basis for denying declaratory relief; instead it relied on general principles addressed to the inappropriateness of granting equitable relief here. This is not reversible error. *See, e.g., Deaver,* 822 F.2d at 71 (complaint sought both injunctive and declaratory relief; in dismissing complaint court did not explicitly state grounds for denying declaratory relief as it did for denying injunctive relief but stated "[p]rospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure"). The district court did not abuse its discretion in denying declaratory relief in the absence of special circumstances and given its "considerations of practicality and wise judicial administration." *See Wilton,* 515 U.S. at 288, 115 S.Ct. 2137.

****2** Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R.App. P. 41(b); D.C.Cir. R. 41.

C.A.D.C.,2006.
Miranda [redacted] Gonzales
173 Fed.Appx. 840, 2006 WL 592928 (C.A.D.C.)

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dismiss the complaint for lack of subject matter jurisdiction.

In re the SEIZURE OF ALL FUNDS IN ACCOUNTS IN the NAMES REGISTRY PUBLISHING, INC., Sterling Who's Who, Inc., Who's Who of Retailers, Inc., William's Who's Who, Inc., Who's Who Executive Club, Bruce Gordon, Who's Who Worldwide Registry, Inc., Publishing Ventures, Inc., including but not limited to Marine Midland Bank Account Nos. 018-78090-3, 018-78047-4, 018-78044-0, 018-78055-5, 018-78153-5, 018-78173-0, Sterling National Bank & Trust Company of New York Account Nos. 035-79716-07, 031-43410-01, 031-43402-01, Republic National Bank for Savings Account No. 2601001775, and All Funds Traceable Thereto.

Bruce GORDON, Who's Who Worldwide Registry, Inc., Sterling Who's Who, Inc., Registry Publishing, Inc., William's Who's Who, Inc., Who's Who Executive Club, Publishing Ventures, Inc., Who's Who of Retailers, Inc., Petitioners-Appellees,

v.

UNITED STATES of America, Respondent-Appellant.

No. 474, Docket 95-6119.

United States Court of Appeals, Second Circuit.

Argued Aug. 31, 1995.

Decided Oct. 17, 1995.

Government appealed from order entered in the United States District Court for the Eastern District of New York, Arthur D. Spatt, J., 887 F.Supp. 435, vacating ex parte seizure warrant authorizing seizure of funds belonging to companies and their founder that were allegedly proceeds of mail and wire fraud scheme involving companies' sales of memberships in various "who's who" registries. The Court of Appeals, Milton Pollack, Senior District Judge, sitting by designation, held that: (1) remand was required for consideration of new evidence to determine exact nature of bargain between companies and members and thus whether salesmen's representations to members were material, and (2) district court lacked authority to enjoin government from mailing additional questionnaires to members to obtain further evidence of probable cause.

Vacated and remanded.

1. Searches and Seizures ⇐83

In order to seize property under civil forfeiture statute, government must demonstrate that there was probable cause to believe that property is subject to forfeiture. 18 U.S.C.A. § 981.

2. Searches and Seizures ⇐83

Whether probable cause exists must be determined on basis of totality of circumstances and, in context of civil forfeiture proceedings, such circumstances are not limited to evidence presented to magistrate who issued warrant. 18 U.S.C.A. § 981.

3. Forfeitures ⇐5

Findings supporting district court's determination as to probable cause to believe that property is subject to forfeiture are reviewed for clear error, but determination itself is conclusion of law reviewed de novo. 18 U.S.C.A. § 981.

4. Postal Service ⇐35(5)

Essential element of mail fraud is intent to defraud; in order to establish that defendant acted with intent to defraud, government must show that some actual harm or injury was contemplated by schemer. 18 U.S.C.A. § 1341.

5. Postal Service ⇐35(11.1)

In order for sales tactics to rise to level of mail fraud, misrepresentations must be material to bargain that customer is induced

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to enter into with company. 18 U.S.C.A. § 1341.

6. **Forfeitures** ⇐5

Determination that probable cause did not exist to believe that companies and their founder had committed mail or wire fraud in connection with sales of memberships in companies' "who's who" registries, and thus that companies' funds were not subject to seizure, had to be remanded for reconsideration of nature of bargain between companies and members in light of members' responses to government questionnaires, and thus whether salesmen's representations could be considered material misrepresentations; while district court concluded that bargain between companies and members entailed purchase of membership in registry and companies making available other services or products, new evidence showed that members had bargained to join exclusive registries that would provide opportunities for networking among prominent group of individuals, and thus registries more exclusive in nature than ones whose members were merely culled from mailing lists. 18 U.S.C.A. §§ 981, 1341, 1343.

7. **Constitutional Law** ⇐73
Injunction ⇐105(1)

In context of government's investigation of alleged mail and wire fraud scheme, and effort to seize funds as proceeds of those schemes, district court lacked authority to enjoin government from mailing additional questionnaires to purported victims of scheme to obtain further evidence of probable cause; as incident to separation of powers, court may not interfere with free exercise of discretionary powers of attorneys of United States in their control over criminal prosecutions.

Barbara Underwood, Assistant United States Attorney, Brooklyn, NY (Zachary W. Carter, United States Attorney for the Eastern District of New York, Deborah B. Zwany, Arthur P. Hui, Sarah J. Lum, Gary R. Brown, Assistant United States Attorneys, Brooklyn, NY, of counsel) for Respondent–Appellant.

Vivian Shevitz, Mount Kisco, New York (Gerald L. Shargel, Jane Simkin Smith, Carol E. Gette, New York City, of counsel) for Petitioners–Appellees.

Before MINER and CALABRESI, Circuit Judges, and POLLACK, Senior District Judge.*

MILTON POLLACK, Senior District Judge:

The government appeals from an order entered in the United States District Court for the Eastern District of New York (Spatt, J.) vacating an *ex parte* seizure warrant that authorized the seizure of funds belonging to petitioners-appellees Bruce Gordon and several companies under Gordon's control, and releasing funds seized pursuant to the warrant. The district court determined that the government failed to establish probable cause to believe that petitioners had committed mail or wire fraud in violation of 18 U.S.C. §§ 1341 and 1343.

For the reasons that follow, we vacate the order and remand for further findings and reconsideration in light of new evidence.

BACKGROUND

Petitioner Bruce Gordon founded and owns a controlling interest in the companies involved in this case, including: Who's Who Worldwide Registry, Inc., Sterling Who's Who, Inc., Who's Who Executive Club, Who's Who Worldwide Communications, Tribute Magazine, Registry Publishing, Inc., Publishing Ventures, Inc., Who's Who of Retailers, and William's Who's Who (collectively, the "Companies"). The oldest of the Companies, Who's Who Worldwide Registry, Inc., was incorporated in 1989.[1]

Gordon formed the Companies in order to solicit individuals to purchase memberships in the registries published by the Companies. The Companies' salespersons contacted po-

* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

1. These companies have no affiliation with "Who's Who in America," published by Reed Elsevier, Inc., and first published in 1899.

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tential customers either by telephone or by sending solicitation letters through the mail. The salespersons explained to potential customers that, upon becoming a member, they would receive a registry containing biographical data and addresses of all members, a personalized plaque, and a camera-ready logo. In addition, customers were told that, as members, they could purchase a CD-ROM version of the registry, a subscription to *Tribute*, a magazine containing profiles of other members, a credit card, and discounted telephone and travel services. The salespersons also stressed that membership was exclusive and prestigious, and that membership would provide valuable networking opportunities. As a result of their sales efforts, the Companies had acquired more than 60,000 members by the end of 1994.

In July of 1994, based on complaints regarding the Companies' business practices received from the New York State Department of Law, the New York State Consumer Protection Board and the Better Business Bureau, the United States Postal Inspection Service commenced an investigation into Gordon and the Companies. The investigation culminated in a complaint and affidavit (the "Complaint"), sworn to by Postal Inspector Martin T. Biegelman. In the Complaint, Biegelman alleges that the Companies' business operations constitute a "telemarketing boiler room" operation using "high pressure telephone sales pitches that misrepresent the identity of the Company and the nature of its products in order to defraud customers into purchasing one of the Company's 'Who's Who' directories and other products." Biegelman contends that the Companies' salespersons made fraudulent representations regarding the nomination and selection process for membership in the registries, the prestige of the registries, free placement in the registries, the identity of other members of the registries, the usefulness of the registries as a networking tool, and the intention of the Companies to hold seminars and conferences. Since 1989, according to Biegelman, Gordon and the Companies have defrauded their customers of more than $22 million dollars. The Complaint concludes with the allegation that the Companies' use of the mail and telephones to conduct the solicitations was in furtherance of a scheme to defraud, and therefore constitutes a violation of the mail and wire fraud statutes.

On March 22, 1995, based on the allegations in the Complaint, United States Magistrate Judge Azrack signed arrest warrants for Gordon and twenty-nine of the Companies' salespersons. The following day, the government obtained an *ex parte* warrant of seizure, pursuant to Fed.R.Crim.P. 41, authorizing the seizure of funds deposited in certain of the Companies' bank accounts. Thereafter, on March 30, 1995, the government seized over $511,000 of the Companies' funds, allegedly the proceeds of the scheme to defraud. As part of its investigation, the government also began contacting and sending questionnaires to those who purchased registry memberships.

On April 10, 1995, the district court issued a temporary restraining order ("TRO") enjoining the government from sending additional questionnaires to members of the Companies' registries. On April 19 and 20, the district court held a probable cause hearing pursuant to *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir.1992) and *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir.1991).

On May 30, 1995, the district court vacated the seizure warrant, finding that the government had failed to establish that there was probable cause to believe that the Companies had committed mail or wire fraud. Relying primarily on *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir.1970), the court determined that the representations made by the Companies' salespersons were not part of a scheme to defraud. The court found that some of the representations were not false, such as the Companies' statements that their registries were "selective" and "invaluable tools for networking among members." Other representations were found by the court to be false or misleading but not material, such as the Companies' statements that they did not acquire new members by solicitation for their directories and that "the majority of new candidates who are nominated are not accepted for inclusion." The district court concluded that the Companies'

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representations did "not constitute a scheme or artifice to defraud, either singly or in the aggregate." In addition to vacating the seizure warrant, the district court vacated the TRO against the government.

The government then moved for a stay of the release of the seized funds. On June 7, 1995, the district court granted a temporary stay pending application to this court for a further stay. On the same day, the government filed a Notice of Appeal of the district court's May 30 Order. On June 9, the court released $220,000 of the seized funds. On June 26, 1995, we denied the government's motion for a stay, pending appeal to this court, of the partial release of seized funds granted by the district court. *In re All Funds in Accounts in Names Registry Publishing, Inc.*, 58 F.3d 855 (2d Cir.1995).

Since the district court's May 30, 1995 vacatur of the TRO, the government has redesigned its questionnaire in order to generate from the registry members information regarding the materiality of the misrepresentations. The government now has mailed over 49,000 questionnaires to the members, and has received approximately 7000 responses. The government has moved in this court for permission to supplement the record with the responses to these questionnaires or, in the alternative, for remand to allow the district court to consider whether its order should be modified in light of these questionnaires.

DISCUSSION

1. *Probable Cause*

[1] In order to seize property under 18 U.S.C. § 981, the government must demonstrate that there was probable cause to believe that the property is subject to forfeiture. *Marine Midland Bank, N.A. v. United States*, 11 F.3d 1119, 1124 (2d Cir.1993). In the context of the seizure of bank accounts allegedly forfeitable under § 981,

> [p]robable cause is established if the government can show that it has reasonable grounds, more than mere suspicion, to believe that the property is subject to forfeiture. The government must be able to show a nexus between the illegal conduct and the seized property. The government is not required to link a bank account to a particular illegal transaction, but it must have probable cause to connect the account to criminal activity.

Id. at 1126 (citations omitted).

[2, 3] Whether probable cause exists must be determined on the basis of the totality of the circumstances. *United States v. Ceballos*, 812 F.2d 42, 50 (2d Cir.1987). In the context of civil forfeiture proceedings, these circumstances are not limited to evidence presented to the magistrate who issued the warrant. *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258, 1268 (2d Cir.1989) ("Once a forfeiture proceeding is brought, if further evidence is legally obtained to justify [a finding of probable cause], there is no persuasive reason to bar its use."). The findings supporting a district court's determination as to probable cause are reviewed for clear error, but the determination itself is a conclusion of law reviewed *de novo*. *United States v. Holder*, 990 F.2d 1327, 1328 (D.C.Cir.1993).

[4] The mail fraud statute, 18 U.S.C. § 1341, provides, in relevant part, that a person is guilty of mail fraud if,

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, [the person] places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service.

An essential element of mail fraud, and the element that is in dispute here, is intent to defraud. *See United States v. D'Amato*, 39 F.3d 1249, 1256–57 (2d Cir.1994). In order to establish that the defendant acted with an intent to defraud, the government "must show that some actual harm or injury was *contemplated* by the schemer." *Id.* at 1257 (internal quotations omitted).

[5] In *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir.1970), we stated that an intent to defraud could be

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found in sales tactics that misrepresent the usefulness of an item. *Id.* at 1180. We asserted that:

> cases sustaining convictions for mail fraud have involved sales tactics and representations which have tended to mislead the purchaser, or prospective purchaser, as to the quality or effectiveness of the thing being sold, or to mislead him with regard to the advantages of the bargain which should accrue to him. Thus claims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it. And promotion of an inherently useful item may also be fraud when the scheme of promotion is based on claims of additional benefits to accrue to the customer, if the benefits as represented are not realistically attainable by the customer.

Id. (internal quotations omitted). Accordingly, in order for sales tactics to rise to the level of mail fraud, misrepresentations must be material to the bargain that the customer is induced to enter into with the company. *See id.* at 1182.

In *Regent*, we held that the particular misrepresentations made by the salespersons were not material to the nature of the bargain between the companies and the customers. *Id.* In that case, customers bargained for office stationery, and, although misrepresentations were made by the stationery companies in order to gain the attention of the customers, the customers received the products for which they had bargained. *Id.* at 1180. Accordingly, such false claims were not material to the bargain between the customers and the companies.

We affirmed the conviction for mail fraud in *United States v. Rowe*, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554, 52 S.Ct. 579, 76 L.Ed. 1289 (1932), involving a scheme to sell worthless land. Although the victims of the scheme did not prove that they had suffered any loss, this court held that the defendants had committed mail fraud because

> [a] man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him.

Id. at 749. In *Regent*, we noted that the "formulation of law stated in the *Rowe* decision" affirmed the proposition "that a wrong has been suffered when a man is deprived of his chance to bargain 'with the facts before him' where the absent facts are facts *material to the bargain* he is induced thereby to enter." 421 F.2d at 1182 (emphasis added).

[6] In the present case, the government contends that the Companies' misrepresentations likewise were material to the bargain between the members and the Companies. The government argues that networking and the financial opportunities that networking might generate were the principal purposes for which the members had joined the Companies' registries. According to the government, the value of the networking, and hence the value of the membership, largely was dependent on the selection criteria and processes used to choose the members. Since the Companies misrepresented these criteria and processes, the government argues, the false claims were material to the nature of the bargain between the members and the Companies, and therefore constituted mail fraud.

The district court, however, found that the misrepresentations of the Companies did not rise to the level of mail fraud. The court stated that the bargain between the Companies and the members entailed both 1) the purchase of "membership in a registry that the member will be listed in," and 2) the Companies' making available "other services or products that either accompany the purchase free of charge" or are available to the members for a cost. In evaluating whether the Companies' sales tactics were material to this bargain, the court examined separately each of the nineteen misrepresentations allegedly made by the Companies. The court concluded that the misrepresentations did "not constitute a scheme or artifice to defraud, either singly or in the aggregate."

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In making this determination, the district court largely relied on our description of fraudulent sales tactics in *Regent*, and found that the sales tactics used by the Companies did not amount to mail fraud. Although the court determined that some of the Companies' representations were "false or deceiving," it found that these representations were "not material to the bargain struck between the membership purchaser and the Company." The court stated that the representations were "not directed at 'the quality, adequacy or price of the goods,' nor [did] they concern facts 'essential in deciding whether to enter the bargain.'" Furthermore, the court found that the members "received exactly what [they] paid for when they purchased a membership," and that there was not a "discrepancy between benefits reasonably anticipated because of the misleading statements and the actual benefits which the defendant delivered, or intended to deliver." Accordingly, the court determined that the government had not shown that it had probable cause to believe that the Companies had committed mail or wire fraud.

Although the court concluded that the Companies' misrepresentations were not material to the bargain between the Companies and the members, we think that the court did not fully evaluate the true nature of the bargain. The members had bargained with the Companies to join exclusive registries that would provide opportunities for networking among a prominent group of individuals. Although the members did obtain membership in "selective" registries, they had bargained to join registries of a more exclusive nature than ones whose members merely were culled from mailing lists. As a result, this may be a different situation than that presented in *Regent*, where the consumers received the products for which they had bargained. In the present case, membership in the registries may not have provided the members with the full networking capability that they expected to receive from the Companies. On remand, the district court should re-examine, with the benefit of the information provided by the new questionnaires, the nature of the bargain and the inducements that impelled the members to join and whether any misrepresentations were material to the bargain.

2. The Injunction

[7] The injunction ordered by the district court enjoined the government from mailing additional questionnaires to obtain further evidence of probable cause. This injunction was improper. In *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301 (5th Cir.1987), *cert. denied*, 484 U.S. 1065, 108 S.Ct. 1026, 98 L.Ed.2d 990 (1988), the Fifth Circuit held that "[a]s an incident to the separation of powers founded in the Constitution, the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." 819 F.2d at 1312 (internal quotation omitted); *see also LaRouche v. Webster*, 566 F.Supp. 415, 417 (S.D.N.Y.1983) (holding that the separation of powers prevents courts from interfering in federal criminal investigations except in the "rarest of circumstances"). We agree. In the present case, the injunction especially resulted in improper interference because, according to our decision in *4492 South Livonia Rd.*, 889 F.2d at 1258, the government may use post-seizure evidence at a probable cause hearing.

On remand, the district court should allow the government to continue collecting questionnaires. We note that, after the vacatur of the injunction, the government redesigned its questionnaires in order to generate from the registry members information regarding the materiality of the misrepresentations. The district court, on remand, should consider the responses to these questionnaires, along with the evidence previously introduced, and reconsider whether the Companies' misrepresentations were material to the bargain between the Companies and the members. The totality of the circumstances should inform the district court's determination of probable cause.

CONCLUSION

For the foregoing reasons, we vacate the order of the district court and remand for

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further findings and reconsideration in accordance with the foregoing.

UNITED STATES of America, Appellant,

v.

Lemrick NELSON, Jr., Defendant–Appellee.

No. 421, Docket 95–1271.

United States Court of Appeals, Second Circuit.

Argued Aug. 29, 1995.

Decided Oct. 17, 1995.

The United States District Court for the Eastern District of New York, David G. Trager, J., denied government's motion to transfer juvenile for adult prosecution. Government appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) juvenile's age at time of transfer proceeding should have been considered; (2) district court should have assumed juvenile committed offense charged in information and not examined strength of government's evidence; (3) juvenile's conviction as adult for actions after alleged offense should have been considered; (4) "glimmer of hope" test for rehabilitation was explicitly rejected; and (5) finding regarding availability of programs designed to treat juvenile's behavioral problems was inadequate.

Vacated and remanded.

1. Infants ⇐68.7(2)

Juvenile alleged to have committed act after 15th birthday which, if committed by adult, would be felony that is crime of violence may be proceeded against as adult where district court, after transfer motion by Attorney General, finds it is in interest of justice to grant transfer. 18 U.S.C.A. § 5032.

2. Infants ⇐68.7(3)

Burden is on government to establish that transfer of juvenile to adult status is warranted, as there is presumption in favor of juvenile adjudication. 18 U.S.C.A. § 5032.

3. Infants ⇐68.7(2)

In determining whether transfer of juvenile to adult status would be in interest of justice, district court must consider, and make findings in record regarding, statutory factors of juvenile's age and social background, nature of offense alleged, nature and extent of any prior delinquency record, present psychological maturity and intellectual development, juvenile's response to past treatment efforts nature of those efforts, and available programs designed to treat juvenile's behavior problems; factors need not be accorded equal weight by district court, and it may balance factors in any way that seems appropriate. 18 U.S.C.A. § 5032.

4. Infants ⇐68.7(2), 68.8

Decision of district court concerning transfer of juvenile to adult status is discretionary and will not be disturbed except upon finding of abuse of discretion and court abuses its discretion when it fails to make required factual findings or where findings it makes are clearly erroneous; district court's interpretation of each statutory factor presents question of law, and Court of Appeals reviews interpretation de novo. 18 U.S.C.A. § 5032.

5. Infants ⇐68.7(3), 68.8

District court erred in refusing to consider juvenile's age at time of transfer proceeding where juvenile was 20; unless government intentionally delayed filing of juvenile charges, there was every reason to give weight to age at time of transfer motion. 18 U.S.C.A. § 5032.

6. Infants ⇐68.7(2)

In evaluating statutory factor concerning transfer of juvenile to adult status, while court correctly focused on juvenile's age of time of offense, but statutory factor specifies only "age" and current age was significant

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723, 79 L.Ed.2d 184 (1984) (listing alternative methods of exhausting federal constitutional issues in state court without specifically referring to them in constitutional terms). Instead, they need only present the *substance* of a federal constitutional claim to the state courts in order to exhaust the issue and preserve it for review in a federal habeas corpus proceeding. *Picard v. Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 513, 30 L.Ed.2d 438 (1971). When a federal habeas petitioner presents what amounts to "a mere variation in the same claim rather than a different legal theory...." *Wilks v. Israel*, 627 F.2d 32, 38 (7th Cir.1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 874, 66 L.Ed.2d 811 (1981), he has presented the state courts with the substance of his claims and thus has properly exhausted them. In *Hutchins v. Wainwright*, 715 F.2d 512 (11th Cir.1983), *cert. denied*, 465 U.S. 1071, 104 S.Ct. 1427, 79 L.Ed.2d 751 (1984), we concluded that a petitioner who had challenged the admission of certain out-of-court statements on state hearsay grounds had adequately presented and preserved a federal constitutional claim concerning the violation of his Sixth Amendment right to confront the witnesses against him.

[11] To the extent that defendant's constitutional claim is based on the failure of the Florida court to follow Florida law, petitioner presented both the state and federal courts with the identical claim, namely that he had been convicted despite the prosecution's failure to demonstrate each element of the offense. In both forums, the only question is whether all of the elements of sexual battery under Florida law have been demonstrated in this case. *Cf. Lanigan v. Maloney*, 853 F.2d 40, 44–46 (1st Cir.1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989) (objection to reasonable doubt instruction in state court sufficient to exhaust constitutional claim premised on same issue); *Hawkins v. West*, 706 F.2d 437, 439 (2d Cir.1983) (same). As a result, we conclude that by contending that the trial court misapplied Florida law and allowed the jury to convict without the necessary showing of criminal intent, petitioner adequately raised and exhausted in state court the federal due process claim he now presents to this Court.

AFFIRMED.

Saul KENT, William Faloon, the Life Extension Foundation, Plaintiffs–Appellants,

v.

James BENSON, Commissioner, Food and Drug Administration, U.S. Department of Health and Human Services, Dexter Lehtinen, U.S. Attorney for the Southern District of Florida, Defendants–Appellees.

No. 90–5710.

United States Court of Appeals,
Eleventh Circuit.

Oct. 22, 1991.

Targets of federal grand jury investigation involving inquiry about whether they and their companies had participated in criminal offenses involving distribution of prescription drugs without prescription and distribution of unapproved new drugs sued to enjoin grand jury proceeding and for advisory opinion from Food and Drug Administration (FDA) with respect to whether their activities were illegal. The United States District Court for the Southern District of Florida, No. 90–1603–CIV-CCA, C. Clyde Atkins, J., dismissed complaint. Plaintiffs appealed. The Court of Appeals held that: (1) targets of grand jury investigation were not entitled to enjoin grand jury proceeding or obtain advisory opinion from FDA with respect to whether their activities were illegal, and (2) appeal from dismissal of complaint was frivolous justifying imposition of economic sanctions.

Affirmed.

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1. **Grand Jury** ⇐33
Injunction ⇐105(1)

Targets of federal grand jury investigation involving inquiry about whether they and their companies had participated in criminal offenses involving distribution of prescription drugs without prescription and distribution of unapproved new drugs were not entitled to enjoin grand jury proceedings or to secure advisory opinion from Food and Drug Administration with respect to whether their activities were illegal. Federal Food, Drug, and Cosmetic Act, § 305, 21 U.S.C.A. § 335.

2. **Federal Civil Procedure** ⇐2840

Appeal from district court's denial of suit to enjoin grand jury proceedings involving plaintiffs and seeking advisory opinion from Food and Drug Administration with respect to whether plaintiffs' activities were illegal was frivolous justifying imposition of economic sanctions including reasonable attorneys fees and double costs.

Michael Pasano, Zuckerman, Spaeder, Taylor & Evans, Humberto J. Pena, Guy A. Rasco, Miami, Fla., for plaintiffs-appellants.

Richard Essen, Essen & Essen, P.A., North Miami Beach, Fla., for William Faloon.

Dexter W. Lehtinen, U.S. Atty., Miami, Fla., Barbara K. Bisno, Asst. U.S. Atty., Deborah S. Smolover, U.S. Dept. of Justice, Jacqueline H. Eagle, Office of Consumer Litigation, U.S. Dept. of Justice, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and EDMONDSON, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

This is a frivolous appeal from the district court's denial of plaintiffs' suit to enjoin the United States Attorney from conducting a grand jury proceeding involving the plaintiffs. On or about April 9, 1990, appellants were advised by letter that they were targets of a federal grand jury investigation. The investigation involved an inquiry about whether plaintiffs and their companies had participated in criminal offenses involving the distribution of prescription drugs without a prescription and the distribution of unapproved new drugs.

[1] The opening paragraph of appellant's complaint describes their cause of action.

> This is an action in the nature of mandamus and pursuant to Title 5, United States Code, Section 702, to compel James Benson, the acting Commissioner of Food and Drug Administration, to follow his own statute, rules and regulations and to give the Plaintiffs appropriate notice and an opportunity to present information and views to show cause why criminal prosecution against them should not be recommended to the United States Attorney for the Southern District of Florida. This action also seeks to compel the United States Attorney for the Southern District of Florida to refrain from pursuing a federal criminal grand jury investigation of Plaintiffs and attempting to secure Plaintiffs' indictment until such time as James Benson, the acting Commissioner of Food and Drugs, has complied with the requirements of the Food and Drug Act and accompanying regulations. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1346 and 1361.

Record Excerpts at 2–1.

The relevant statute is Title 21 U.S.C. § 335, and provides:

> Before any violation of this chapter is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding.

The district court dismissed the complaint, holding that the court lacked the authority to grant relief. The appellants in effect were seeking an injunction of the grand jury proceeding and an advisory opinion from the Food and Drug Adminis-

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tration with respect to whether their activities were illegal. The court was obviously correct in dismissing the complaint. Without getting into a lengthy history of the statute, suffice it to say that it was enacted on June 30, 1906. The law has been twice interpreted by the United States Supreme Court to deny the relief sought by appellants here. First, in *United States v. Morgan*, 222 U.S. 274, 32 S.Ct. 81, 56 L.Ed. 198 (1911), the Court closed its opinion with the following sentence:

> There is nothing in the nature of the offense under the pure food law, or in the language of the statute, which indicates that Congress intended to grant violators of this act a conditional immunity from prosecution, or to confer upon them a privilege not given every other person charged with a crime.

The Supreme Court confirmed this holding in *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943).

[2] Appellants cite no authority to support the appeal of the district court order to this court and, of course, they have none. The arguments being without arguable merit, economic sanctions are in order, including reasonable attorneys fees and double costs. Upon receipt of the mandate, the district court, after hearing, should determine the amount. *See Hopson v. Fischbeck*, 758 F.2d 579 (11th Cir.1985).

AFFIRMED.

[redacted] H. POWELL, Plaintiff–Appellant,

v.

UNITED STATES of America, Defendant–Appellee.

No. 90–6034.

United States Court of Appeals, Eleventh Circuit.

Oct. 22, 1991.

Member of Church of Scientology filed complaint against Internal Revenue Service (IRS) seeking tax refunds on grounds that IRS inconsistently administered charitable deductions for quid pro quo payments to religious organizations. The United States District Court for the Southern District of Florida, No. 90–8271–CIV-JLK, James Lawrence King, J., granted a motion to dismiss. Church member appealed. The Court of Appeals, Dubina, Circuit Judge, held that church member's allegation of administrative inconsistency stated claim upon which relief could be granted.

Vacated and remanded.

1. Federal Courts ⇐794

Court of Appeals must accept plaintiff's allegations as true when reviewing dismissal of complaint for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1772

District court may dismiss complaint for failure to state claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

3. Constitutional Law ⇐84.5(7)

Allegations by member of Church of Scientology that Internal Revenue Service (IRS) inconsistently administered charitable deductions for quid pro quo payments to religious organizations on federal income tax returns stated cause of action for discrimination among religions prohibited by establishment clause of First Amendment. 26 U.S.C.A. § 170; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐84(1)

Establishment clause of First Amendment prohibits denominational preferences, including those created by discriminatory or selective application of facially neutral statute; Government may not discriminate among religions by applying or enforcing

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Westlaw.

42 Am. Jur. 2d Injunctions § 180

C

American Jurisprudence, Second Edition
Database updated November 2007
Injunctions

Richard B. Gallagher, J.D., Timothy M. [redacted], J.D., Gary A. Hughes, J.D, Steven D. Najarian, J.D., Jeffrey A. Schafer, J.D., and Jeffrey J. Shampo, J.D.

III. Kinds of Rights Protected and Matters Controllable
G. Acts of Public Bodies or Officials
3. Enforcement of Statutes, Ordinances, or Administrative Orders
b. Types of Laws

Topic Summary; Correlation Table; References

§ 180. Criminal or penal statutes--Grand jury proceedings

A grand jury cannot be enjoined from conducting lawful investigations and deliberations.[FN35] Thus, targets of a federal grand jury investigation involving an inquiry about whether they and their companies had participated in criminal offenses involving the distribution of prescription drugs without a prescription and distribution of unapproved new drugs were not entitled to enjoin grand jury proceedings or to secure an advisory opinion from Food and Drug Administration with respect to whether their activities were illegal. [FN36] The target of a federal grand jury investigation had an adequate remedy at law for any irregularity in the investigative process and was not entitled to injunctive relief to prevent the grand jury from returning an allegedly tainted indictment.[FN37]

[FN35] Ex parte Jones County Grand Jury, First Judicial Dist., 705 So. 2d 1308 (Miss. 1997).

[FN36] **Kent [redacted]. Benson, 945 F.2d 372 (11th Cir. 1991)**.

[FN37] Blalock [redacted] U.S., 844 F.2d 1546 (11th Cir. 1988), reh'g denied, 856 F.2d 200 (11th Cir. 1988) and (distinguished by, Westin [redacted]. McDaniel, 760 F. Supp. 1563 (M.D. Ga. 1991)) and (disagreed with on other grounds by, Finn [redacted]. Schiller, 72 F.3d 1182 (4th Cir. 1996)).

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AMJUR INJUNCTION § 180
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EDITH H. JONES, Circuit Judge, concurring:

I write separately to emphasize what I believe is most salient in the majority's careful exposition of 28 U.S.C. §§ 2680(a) and (h): these sections of the FTCA must be harmonized. In achieving harmony, a task made no simpler by Congress's draftsmanship and the sketchy legislative history of the law enforcement proviso, it is not necessary to conclude with the majority that "even *Bivens* and Collinsville would not pass muster" if the law enforcement proviso, § 2680(h), is subject to the discretionary function exception, § 2680(a). As the majority elsewhere observe, this court has held that violations of agency regulations do not fall within the discretionary function exception so as to immunize the federal government from tort liability. *See*, e.g., *Collins v. United States*, 783 F.2d 1225 (5th Cir.1986).

What I believe will require particular sensitivity in this task of statutory construction is preserving prosecutorial and discretionary law enforcement immunity. *Compare Smith v. United States*, 375 F.2d 243 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106 (1967) (decisions on when, where and against whom to prosecute are discretionary under § 2680(a)); *Gray v. Bell*, 712 F.2d 490, 505 (D.C.Cir. 1983) ("Although the concepts of 'discretion' in official immunity law and under the FTCA are not of identical scope, they are similar and may have a common origin"). In law enforcement, while the opportunities for government abuse abound, the incentive for oppressive use of FTCA lawsuits is powerful and pervasive. What better way to "get even" with one's accuser than to file suit against the government on account of his investigatory conduct? Such lawsuits are hardly less deleterious to conscientious law enforcement than are actions seeking to impose personal liability, because they equally threaten careers and reputations, divert official time and resources, and imperil impartial decisionmaking. The doctrines of absolute prosecutorial and qualified official immunity from personal liability are essential to shield the law enforcement community from unwarranted interference with their vital functions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 806, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982). The discretionary function exception to the Federal Tort Claims Act should perform a similar role as the courts continue to interpret the law enforcement proviso. The panel's use of the *Elliott v. Perez* pleading standard in cases involving §§ 2680(a) and (h) is a step in the direction of creating the necessary harmony.

UNITED STATES of America, Plaintiff-Counter Defendant-Appellee,

v.

BURZYNSKI CANCER RESEARCH INSTITUTE, et al., Defendants-Counter Plaintiffs-Appellants

and

Janice Kuharzyk, and Other Patients of Dr. Stanislaw R. Burzynski, et al., Intervenors-Counter Plaintiffs-Appellants.

No. 86-2183.

United States Court of Appeals, Fifth Circuit.

June 25, 1987.

Action was brought against physician and research center seeking to enjoin them from violating Federal Food Drug, and Cosmetic Act by interstate distribution of product used in cancer chemotherapy, antineoplastons, on ground that they were "new drugs" within meaning of Act, and were being distributed without prior approval by Food and Drug Administration. Government also sought to enjoin manufacturer in distribution of antineoplastons on ground that drugs were adulterated within meaning of Act. Physician's patients were permitted to intervene. After execution of

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criminal search warrant, physician filed counterclaim seeking damages, injunctive relief, and contempt orders against Government and certain FDA employees. The United States District Court for the Southern District of Texas, Gabrielle K. McDonald, J., dismissed counterclaims, and appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) claims under Federal Tort Claims Act required, as jurisdictional prerequisite, administrative review; (2) employees involved in obtaining criminal search warrant were entitled to immunity from common law and constitutional tort claims; (3) physician and patients were not entitled to return of seized patient records; (4) physician and patients were not entitled to injunction against use of records; (5) physician and patients were entitled to develop facts to support their claim to injunctive relief with respect to Government's allegedly providing insurance companies with false and misleading information; and (6) Government complied with obligations under permanent injunction and, thus, it and its employees were not in contempt.

Affirmed in part, reversed in part, and remanded.

1. Federal Civil Procedure ⇐1957

District court did not, in electing not to restate, in its dismissal order, legal analysis it had already set forth in denial of preliminary motions for a temporary restraining order, return of property, and contempt, conduct trial on merits, much less impermissibly consolidate trial with hearing on preliminary motions.

2. Federal Civil Procedure ⇐1836

Order denying preliminary motion for a temporary restraining order, return of property, and contempt, and order dismissing action, taken together, adequately presented full review of actions taken by district court and its reasons therefor; district court elected not to restate in its dismissal order legal analysis it had already set forth in its denial of preliminary motions.

3. United States ⇐127(2)

Failure of physician and patients, asserting claim under Federal Tort Claims Act in connection with seizure of patient-treatment records during fraud and drug investigation pursuant to criminal search warrant, to file administrative claim for relief required that claim be dismissed, in that administrative review was jurisdictional prerequisite under Act; it would not have been appropriate merely to stay suit until claim could be filed once issue was raised. 28 U.S.C.A. §§ 1346, 2671 et seq.

4. Federal Civil Procedure ⇐2533

Affirmative defense may be raised on motion for summary judgment only if that motion is first pleading responsive to substantive allegations. Fed.Rules Civ.Proc. Rule 8(c), 28 U.S.C.A.

5. Federal Civil Procedure ⇐1823, 2532

None of Government's initial filings was responsive "initial pleading," such as would preclude, due to waiver, raising affirmative immunity defenses on part of individual government employees in motion to dismiss or for summary judgment. Fed. Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

6. United States ⇐50.5(3)

Federal employees are absolutely immune from common-law tort suits for damages arising out of performance of either mandatory or discretionary acts that are within outer perimeter of their line of duties; immunity extends even to allegedly malicious acts.

7. United States ⇐50.10(3)

Activities of federal employees with respect to application for and execution of criminal search warrant, pursuant to which physician's patient-treatment records were seized, were within scope of their duties and, therefore, employees were absolutely immune from suit for common-law torts allegedly committed in connection with search warrant.

8. United States ⇐50.10(3)

Federal employees involved in obtaining and executing warrant for search of business premises occupied by physician were entitled to qualified immunity shield-

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ing them from liability for their acts with respect to constitutional tort claims of physician and patients; employees followed established constitutional procedures and violated no norms of clearly established law. U.S.C.A. Const.Amends. 4, 5, 8.

9. Searches and Seizures ⇐26, 150
Witnesses ⇐212

Patients had no legitimate expectation of privacy in records maintained by physician that could be asserted against criminal search warrant and, thus, no standing to seek return of records; under Texas law, seizure pursuant to search warrant issued as part of criminal investigation was exempt from physician-patient privilege. Vernon's Ann.Texas Civ.St. art. 4495b, § 5.08(b) (Repealed); Fed.Rules Cr.Proc. Rule 41(e), 18 U.S.C.A.

10. Searches and Seizures ⇐150

Physician and patients alleged no basis on which it could be found that seizure of patient-treatment records pursuant to criminal search warrant was unlawful, such as would entitle them to obtain return of records. Fed.Rules Cr.Proc.Rule 41(e), 18 U.S.C.A.

11. Injunction ⇐105(1)

District court could not enjoin Government in its use of patient-treatment records seized, pursuant to criminal search warrant, from physician's business, absent allegation of any improper use of seized records by Government.

12. Injunction ⇐105(1)

Government would not be enjoined from communicating with physician's present and former patients and their insurance carriers, in connection with seizure of patient-treatment records pursuant to criminal search warrant, in that such injunction would interfere with free exercise of discretionary powers of attorneys of the United States in their control over criminal prosecutions; injunction would have impeded or totally frustrated Government's ability to pursue its investigation of, among other things, interstate distribution of antineoplastons, fraudulent over-billing and double-billing of insurance companies, and false statements to Government.

13. Injunction ⇐105(1)

Allegations of unlawful seizure of patient-treatment records could not form cognizable basis for claiming that Government had or would interfere impermissibly with physician's treatment of patient's solely within State of Texas, such as would entitle physician and patient's to injunctive relief against interference; there was simply no geniune issue of such threat raised.

14. Administrative Law and Procedure ⇐232
Drugs and Narcotics ⇐23

Physician failed to make good-faith effort to obtain investigational new drug status for antineoplastons from FDA and to exhaust administrative remedies with respect to application, and, therefore, he could not be entitled to injunctive relief against government's interfering with his treatment of patients with antineoplastons by refusing to grant IND status to drug.

15. Drugs and Narcotics ⇐10

Failure to allege facts establishing that investigational new drug status was improperly withheld from antineoplastons precluded patients' indirect challenge to FDA action, based on allegations that their constitutional right to travel freely between states was being infringed.

16. Drugs and Narcotics ⇐23

Patients had no claim for injunctive relief against Government's interference with interstate distribution of antineoplastons based on asserted constitutional right to obtain medical treatment that was encompassed by the right to privacy.

17. Injunction ⇐105(1)

Physician and patients were entitled to develop facts that could entitle them to injunctive relief with respect to claim that Government provided insurance company's with false and misleading information, given finding that at least two statements by government employee in response to inquiries about physician and his treatment were nearly inappropriate, exceeded his duties and responsibilities as officer of

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FDA, and misled audience by asserting charges still subject to investigation.

18. Injunction ⇐223

FDA advised physician of its position with respect to manufacturing practices of research institute and, thus, was in compliance with terms of permanent injunction; accordingly, Government and employees could not be in civil contempt.

Christian P. Di Ferrante, John T. Johnson, Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, Houston, Tex., for Burzinski Cancer Research Institute.

Margaret A. Harris, Stuart M. Nelkin, Nelkin & Nelkin, Houston, Tex., for Juanice Kuharzyk, etc., et al.

Gerald C. Kell, Atty., U.S. Dept. of Justice, Office of Consumer Lit., Washington, D.C., Linda M. Cipriani, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Frank A. Conforti, James R. Gough, Asst. U.S. Attys., Houston, Tex., for the U.S.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN, RANDALL, and JOHNSON, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Armed with a search warrant, the government seized a doctor's patient-treatment records during an investigation to determine whether the doctor had violated criminal fraud statutes and a criminal statute forbidding the interstate shipment of drugs that had not been approved by the Food and Drug Administration. The doctor and some of the patients, as intervenors, sought to have the records returned and to obtain damages and other relief by filing a counterclaim in a previously pending civil action filed by the government to enjoin interstate distribution of the drug. The district court properly held that the doctor and his patients have failed to establish any basis entitling them to a hearing on the validity of the search warrant or any grounds for finding that the seizure of the records was unconstitutional. We therefore affirm its dismissal of all counterclaims regarding the seizure or continued government retention of documents from the doctor's offices. Because, however, in the absence of an opportunity to conduct discovery regarding their contention that the government had provided insurance companies with false and misleading information, the doctor and his patients have not had a chance to develop facts that may entitle them to injunctive relief on that score, we remand that counterclaim for further proceedings.

I.

In 1983, the United States sued Dr. Stanislaw R. Burzynski and the Burzynski Cancer Research Institute (together referred to as Dr. Burzynski) in this civil action seeking to enjoin them from violating the Federal Food, Drug, and Cosmetic Act [1] by interstate distribution of a product used in cancer chemotherapy, antineoplastons, on the ground that the antineoplastons were "new drugs" within the meaning of the Act,[2] and were being distributed without prior approval by the Food and Drug Administration. Dr. Burzynski manufactures the natural type of antineoplastons from urine, and synthetic forms, called antineoplastons 10, from various chemicals. The government also sought to enjoin the manufacture and distribution of antineoplastons on the ground that the drugs were adulterated within the meaning of the Act [3] because Dr. Burzynski's manufacturing methods, facilities, and controls did not comply with the FDA's current good manufacturing practice regulations. A number of Dr. Burzynski's patients were allowed to intervene. After a two-day hearing, the district court issued an injunction granting most of the relief sought by the government. It also directed Dr. Burzynski to bring his research and manufacturing facility into compliance with FDA's current

1. 21 U.S.C. § 301, et seq. (1982).

2. 21 U.S.C. § 321(p).

3. 21 U.S.C. § 351(a)(2)(B).

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good-manufacturing procedures, ordering the FDA in turn to act promptly on their submission for approval. The order, however, expressly allowed Dr. Burzynski to continue manufacturing and prescribing the drug in Texas. The court expressly retained continuing jurisdiction to enforce or modify its order.

Two years later, in July 1985, as part of a criminal investigation based on a referral from the FDA to the Department of Justice, the government applied for and obtained a warrant to search an office complex that, as the warrant stated, housed the administrative offices of Dr. Burzynski and the Burzynski Research Institute, Incorporated, a separate legal entity from Burzynski Cancer Research Institute, which had been a defendant in the civil action. The application for the warrant was supported by the affidavit of FDA Compliance Officer, Kenneth P. Ewing. Ewing stated that the application was based on FDA inspections and investigations of Dr. Burzynski and the Institute, information supplied by insurance companies that had received claims from Dr. Burzynski, information supplied by the surviving spouse of one of Dr. Burzynski's patients, and information supplied by confidential informants.

In terms set forth in full in the footnote,[4] the warrant authorized a search for and seizure of records and other property that reflected distribution of antineoplastons outside the State of Texas and other records that would show the antineoplastons had been and were being distributed in interstate commerce in violation of Title 21, United States Code 331(d), the court injunction, and Title 18, United States Code, Sections 286, 287, 371, 401, 1001, 1341, and 1505. During the search Dr. Burzynski's employees were allowed to take records to a commercial copying center to make copies. On the advice of his employees, Dr. Burzynski himself "decided to give away filing cabinets along with the records" in order to protect the records. Since the execution of the search warrant, Dr. Burzynski has been allowed to install a copying machine in the FDA offices in Houston where the seized patient treatment records are being held and has made copies of those treatment records that he desires.

After the warrant had been executed, Dr. Burzynski and the Burzynski Research Institute, Inc. filed a counterclaim in this civil action seeking damages, injunctive relief, and contempt orders against the government and certain FDA employees, including the FDA Compliance Officer Ewing, Sharyn Miller, an investigator who had assisted Ewing in executing the warrant, and other unknown agents of the FDA and the United States. Certain named patients of Dr. Burzynski were given leave to file their own counterclaim as intervenors and sought a temporary restraining order commanding return of the records and other emergency relief.

During a twelve-day hearing on the motion for a temporary restraining order and contempt ruling, Dr. Burzynski testified that he had continued to treat patients in Texas. Based on what some of them told him, he suspected that antineoplastons were supplied from the Institute to patients in other states, but he testified that he did not believe it would be possible to detect such shipments with certainty unless every one of the Institute's employees had "a spy on his back." After the hearing was completed, the district court denied all of the motions.

The government then responded to the counterclaims by moving for their dismis-

4. Records and other property, including antineoplastons, of Stanislaw R. Burzynski, M.D., Burzynski Research Institute, Incorporated, Cameron Frye, and North American Consultants, Limited, that reflect:
(a) distribution of antineoplastons outside the State of Texas;
(b) the true addresses of persons to whom antineoplastons have been and are being distributed;
(c) patient treatment, patient accounts, and patient billings; and
(d) insurance claims and receipt of insurance payments that show that antineoplastons have been and are being distributed in interstate commerce in violation of Title 21 United States Code, Section 331(d) and the injunction of this Court and that evidence violations of Title 18, United States Code, Sections 286, 287, 371, 401, 1001, 1341, and 1505.

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sal for failure to state a claim for which relief could be granted or, in the alternative, for summary judgment. In a brief order, which referred to the evidence adduced in the earlier hearing on the motion for a temporary restraining order, the court dismissed the counterclaims.

II.

[1] Dr. Burzynski and the patients contend that the district court impermissibly consolidated the hearing on the motions for TRO, return of property, and contempt (the preliminary motions) with trial on the merits of their counterclaims. The simple fact is that no such consolidation occurred. At the close of the hearing on the preliminary motions, the district court orally denied those motions. Thereafter, the court entered a nine-page order setting forth its findings with respect to the preliminary motions and its legal basis for denying those motions. Subsequent to the hearing on the preliminary motions, the government filed its motion to dismiss for failure to state a claim or, alternatively, for summary judgment on all of the counterclaims. In an order separate from the order denying the preliminary motions, the district court dismissed the counterclaims.

The district court did state in the later order that, because the issues raised in the counterclaims "raise legal questions which were decided against the Defendants and Intervenors [Dr. Burzynski and the patients] in the hearing of October 23, 1985" (the hearing on the preliminary motions), it would not repeat its discussion of those issues. In other words, the district court simply elected not to restate in its dismissal order legal analysis it had already set forth in its denial of the preliminary motions. In deciding, based on that legal analysis, to dismiss the counterclaims, the district court did not conduct a trial on the merits, much less impermissibly consolidate trial with the hearing on the preliminary motions.

[2] The patients also attack the dismissal order as being "pithy to the point of being incomplete" and ask this court to vacate it and remand the case for further consideration. In support of that request, they rely on *Myers v. Gulf Oil Corporation*,[5] in which we held that a district court's explanation that the defendant should be granted summary judgment "because the Plaintiff has failed to state a claim on which relief can be granted" was insufficient to explain that court's reasoning. The patients' argument focuses on the length of the district court's dismissal order rather than on its content. Taken together, the two orders adequately present for our review both the actions taken by the district court and its reasons.

III. Claims for Monetary Relief

Dr. Burzynski and the patients seek monetary damages from the United States, FDA, FDA employees Ewing and [redacted] (both individually and in their official capacities), and unknown agents of the United States and the FDA. We discuss these claims separately.

A. Claims Against the Government

[3] Neither the United States, its agencies, nor its officials acting in their official capacities, may be sued without the United States' specific consent.[6] The Federal Tort Claims Act[7] permits certain claims to be asserted against the United States, as sovereign, and its agents but exacts the filing of an administrative claim for relief as a jurisdictional prerequisite to suit. No such claim has been filed. Therefore, the district court properly dismissed the damage claims against the United States, the FDA, and federal officials acting in their official capacities. Because the requirement of administrative review is a jurisdictional requisite, it would not have been appropriate merely to stay the suit until a claim could

5. 731 F.2d 281, 283 (5th Cir.1984).

6. *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941); *Zapata v. Smith*, 437 F.2d 1024, 1025 (5th Cir.1971); *Carter v. Seamans*, 411 F.2d 767, 770 (5th Cir. 1969), *cert. denied*, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121 (1970).

7. 28 U.S.C. § 2671, et seq. (1982).

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be filed, as Burzynski sought, once the issue was raised.[8]

B. Claims Against Individual Government Employees

In seeking monetary damages against the government employees as individuals, Dr. Burzynski and the patients asserted both common law tort claims and claims under the Constitution. All of the damages claims asserted against individual government employees related to and arose out of the application for and execution of the criminal search warrant for Dr. Burzynski's business premises, and all are barred by immunity doctrines.

1. Waiver of Immunity Defenses

[4] Dr. Burzynski and the patients contend that the government cannot rely on immunity defenses for the individuals named as defendants because such affirmative defenses may not be raised by means of a motion to dismiss or for summary judgment. The circuit courts disagree whether the affirmative defenses listed in Fed.R.Civ.P. 8(c) must be asserted in the defendant's answer or may be raised for the first time in a motion to dismiss or other dispositive motion.[9] In *Funding Systems Leasing Corp. v. Pugh*, a panel of this court stated that a defendant may raise an affirmative defense by a motion for summary judgment only when that motion "is the initial pleading tendered by [the] defendant."[10] Although the rule quoted above suggests that any prior pleading will defeat the defendant's right to raise an affirmative defense in a summary judgment motion, in the context of the decision as a whole it becomes apparent that the *Funding Systems* opinion was referring only to pleadings responsive to the substantive issues charged. The *Funding Systems* decision itself specifically noted that the defendant in that case had failed to allege his affirmative defense in any "responsive pleading."[11] The decision, therefore, did not address the issue whether prior pleadings that are unresponsive to the substance of the allegations should preclude the possibility of raising affirmative defenses in a subsequent responsive pleading. Because no other panel of this court has had occasion to apply the rule that *Funding Systems* sets forth, the proper interpretation of the rule remains undecided, and we adopt what we believe to be the most principled interpretation of the standard: An affirmative defense may be raised on a motion for summary judgment only if that motion is the first pleading responsive to the substance of the allegations.

[5] Although in this case the government filed a brief memorandum in opposition to Dr. Burzynski's original counterclaim and several preliminary motions before filing its motion to dismiss or for summary judgment, none of those filings is a responsive "initial pleading" within the meaning of *Funding Systems*. The government's initial memorandum is not a "pleading" and did not purport to respond to the substantive charges of the counterclaim. It presented only a legal analysis of the procedural posture of the case, raising issues about whether the counterclaim was filed in accordance with the Federal Rules of Civil Procedure and about the propriety of using civil counterclaims as a means of hampering criminal investigations. Similarly, the government's ensuing motions—which are "pleadings" within the meaning of the Rules—were not responsive to the substance of the counterclaims, but sought only to preserve counter-defendants' rights pending preparation of an answer or dispositive motion. Because the government, therefore, set forth its affirmative argument in its first responsive pleading, it has preserved its immunity defenses.

8. *Gregory v. Mitchell*, 634 F.2d 199, 203–04 (5th Cir.1981).

9. *See* C. Wright and A. [redacted], *Federal Practice and Procedure* § 1277, at 328–29 (1969). *Compare Williams* [redacted] *Murdoch*, 330 F.2d 745 (3d Cir.1964); *Continental Collieries, Inc.* [redacted] *Shober*, 130 F.2d 631 (3d Cir.1942) *with Eberle* [redacted] *Sinclair Prairie Oil Co.*, 35 F.Supp. 296 (E.D.Okla. 1940), *aff'd*, 120 F.2d 746 (10th Cir.1941).

10. 530 F.2d 91, 96 (5th Cir.1976).

11. *Id.*

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2. Common Law Tort Claims

[6] Federal employees are absolutely immune from common law tort suits for damages arising out of the performance of either mandatory or discretionary acts that are, as the Supreme Court stated in Barr [redacted]. Matteo, "within the outer perimeter of the [employees'] line of duty." [12] This immunity extends even to allegedly malicious acts.[13]

[7] It is difficult to sort out the common law claims of Dr. Burzynski and the patients from their constitutional claims. Reading the counterclaims as broadly as possible, however, it appears that, with respect to the application for and execution of the search warrant, Dr. Burzynski asserted common law claims for abuse of process and for some type of tortious interference with his relationship with his patients, while the patients asserted a common law claim for abuse of process.

Ewing's duties as a compliance officer with FDA included reviewing investigative records of FDA and other evidence gathered by FDA to determine whether there were apparent violations of the FDC Act or other laws, making recommendations for appropriate civil or criminal legal action, conducting investigations, and collecting of information and samples. FDA compliance officers and investigators also are required, in conjunction with a United States Marshal, to execute criminal search warrants. Moreover, Ewing was the person within FDA chiefly responsible for the investigation of Dr. Burzynski.

Acting upon information gathered in the course of previous FDA investigations of Dr. Burzynski and others, and upon information supplied to him by named individuals and confidential informants, Ewing, [redacted] and other federal employees pursued a new investigation of Dr. Burzynski to determine if Dr. Burzynski had violated the Act and other federal criminal statutes by failing to adhere to the requirements of the permanent injunction entered by the district court in May 1983. That investigation included the application for and execution of the criminal search warrant.

The activities of Ewing, [redacted], and the other federal employees with respect to the search warrant were clearly within the scope of their duties. Therefore, they are absolutely immune from suit for the common law torts allegedly committed in connection with the search warrant, and dismissal of the damage claims based on those alleged torts was proper.

3. Constitutional Tort Claims

[8] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[14] the Supreme Court held that federal officers who, acting under color of their federal authority, but without a warrant, entered and searched the plaintiff's apartment and arrested him, could be personally sued for monetary damages for deprivation of the plaintiff's rights under the fourth amendment. The holding of *Bivens* was extended to deprivations of fifth amendment due process rights in *Butz v. Economou*,[15] to violations of the right to equal protection as embodied in the fifth amendment in *Davis v. Passman*,[16] and to the eighth amendment's prohibition against cruel and unusual punishment in *Carlson v. Green*.[17]

Shortly after its recognition of a right of action for constitutional torts under *Bivens*, the Supreme Court began to develop the defense of qualified immunity to protect federal employees against liability for,

12. *Barr v. Matteo*, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 1434 (1959). *Accord Evans v. Wright*, 582 F.2d 20, 21 (5th Cir.1978).

13. *Barr*, 360 U.S. at 575, 79 S.Ct. 1341; *Norton [redacted] McShane*, 332 F.2d 855, 858 (5th Cir.1964), *cert. denied*, 380 U.S. 981, 85 S.Ct. 1345, 14 L.Ed.2d 274 (1965).

14. 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

15. 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

16. 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

17. 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980).

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and the burden of defending themselves against, alleged violations of constitutional rights. As first formulated in *Butz v. Economou*, qualified immunity had both an objective and subjective element: the federal official was entitled to immunity if there were reasonable grounds to believe that the challenged conduct did not violate a constitutional right (the objective element) and the official undertook the challenged conduct in a good-faith belief that the conduct was valid (the subjective element).[18]

On further consideration, however, the Court in *Harlow v. Fitzgerald* stated, "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." [19] Therefore, the Court eliminated the subjective element of the qualified immunity defense. Government officials performing discretionary functions, it held, are shielded from liability for civil damages whenever their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[20]

Reading Dr. Burzynski's counterclaim most broadly, it appears to allege that Ewing violated the fourth amendment by obtaining the criminal search warrant for Dr. Burzynski's business premises "to accomplish purposes outside the proper scope of a search warrant," i.e., "for the apparent ulterior purpose of forcing [Dr. Burzynski] out of business." The government contends, however, that the warrant was issued by an independent judicial officer, the United States Magistrate, and that under this court's decision in *Jureczki v. City of Seabrook, Texas*,[21] "[a] judge's determination of probable cause breaks the chain of causation and insulates the initiating party from liability." [22] Dr. Burzynski counters by correctly pointing out that the Supreme Court rejected the rationale underlying that broadly-stated rule in *Malley v. Briggs*.[23]

In *Malley*, the Court held that an officer may not rely on the judgment of a judicial officer in finding that probable cause exists if "a reasonably well-trained officer would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." [24] This holding, however, does not signal a retreat from the principle that, to give rise to liability, the actions of a public official must be objectively unreasonable in the light of clearly established law. Malice, therefore, remains "irrelevant in obtaining a warrant where probable cause exists." [25]

Dr. Burzynski's counterclaim alleges no misstatements or omissions in Ewing's affidavit that would have obviated probable cause if corrected. Indeed, Dr. Burzynski in effect supported its correctness by testifying that, based on the affidavit as well as his own independent suspicions, he suspected that antineoplastons were being transported out of Texas, that the Institute has been obliged to refund hundreds of insurance overpayments resulting from insurance companies being billed for services already paid for by patients, and that on at least one occasion an insurance claim was submitted for an office visit when the patient did not actually come to the Institute.

Dr. Burzynski's counterclaim does contain an allegation that the search warrant

18. 438 U.S. at 495–98, 507, 98 S.Ct. at 2905–07, 2911.

19. *Harlow v. Fitzgerald*, 457 U.S. 800, 815–16, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982).

20. 457 U.S. at 817–18, 102 S.Ct. at 2737–38. *See also David v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3018, 82 L.Ed.2d 139 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12, 105 S.Ct. 2806, 2820 n. 12, 86 L.Ed.2d 411 (1985); *Saldana v. Garza*, 684 F.2d 1159, 1163 (5th Cir.1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1253, 75 L.Ed.2d 481 (1983).

21. 760 F.2d 666, 668 (5th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 1261, 89 L.Ed.2d 571 (1986).

22. *Id.* (citing *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1137, 103 S.Ct. 772, 74 L.Ed.2d 984 (1982)).

23. 475 U.S. 335, —, 106 S.Ct. 1092, 1098–99, 89 L.Ed.2d 271 (1986).

24. *Id.* (footnote omitted).

25. *Jureczki*, 760 F.2d at 668.

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"was not supported by affidavits and evidence sufficient to establish probable cause." Based on no more than this unsupported charge, and despite the admonition of the Supreme Court in *Franks v. Delaware* [26] that to mandate an evidentiary hearing such a charge must also assert deliberate falsehood or reckless disregard for truth and must be accompanied by an offer of proof, the district court allowed a lengthy cross-examination of Ewing regarding his affidavit. Nonetheless, the district court found no basis even to proceed with a hearing on the validity of the search warrant, much less to justify a finding that the warrant was not validly supported. In this circuit, once a government employee has asserted qualified immunity and established that the allegedly tortious acts were undertaken within the scope of his discretionary authority, the burden shifts to the party seeking damages to show that qualified immunity does not bar recovery.[27] Dr. Burzynski has failed to suggest any factual basis upon which a trier of fact could find that probable cause was lacking or that agent Ewing's action in seeking the search warrant was objectively unreasonable. Therefore, the individual defendants were entitled to have those charges against them dismissed.

In addition, both Dr. Burzynski and the patients asserted constitutional claims with respect to the government employees' execution of the warrant. Both Dr. Burzynski and the patients challenged the warrant as overly broad (not properly limited in scope), Dr. Burzynski alleging a fourth amendment violation and the patients a fifth amendment violation. Additionally, the patients alleged that seizure of their medical records was unreasonable, in violation of the fourth amendment, and infringed their constitutional rights to privacy, to life, and to obtain medical treatment. Again, these claims could survive the government defenses of qualified immunity only if Dr. Burzynski and the patients demonstrated a reasonable basis to believe that the execution of the search warrant violated "clearly established law." [28] They simply failed to do so. According to the counter-claimants' own witnesses, the documents seized were only those described in the warrant. Since the seizure of these specific documents was thus authorized, the seizure was in accord with, rather than in contravention of, clearly established law.

The patients also assert that seizure of their treatment records, which belonged to Dr. Burzynski or the Institute and were in the possession of the Institute, invaded their right to privacy. That they have a privacy interest in such documents [29] does not establish the immunity of the documents from seizure. The patients do not cite a single case in which seizure of documents authorized by a warrant has been found to be an unconstitutional invasion of privacy. The absence of such citations is not surprising since a warrant issued upon "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." [30] In any event, seizure of the patients' treatment records pursuant to a warrant did not violate clearly established law so as to subject the government agents to individual liability.

The patients also assert that seizure of their treatment records deprived them of their right to life and to medical treatment. This claim was unsupported by factual allegations creating any basis to believe that the treatment of patients would be substantially hindered. All of the parties agree that the records are available for

26. 438 U.S. 154, 171–72, 98 S.Ct. 2674, 2684, 57 L.Ed.2d 667 (1978).

27. *See Saldana v. Garza*, 684 F.2d at 1163 n. 14 (citing *Garris v. Rowland*, 678 F.2d 1264, 1271 (5th Cir.1982); *Rheaume v. Tex. Dept. of Public Safety*, 666 F.2d 925, 930 (5th Cir.1982); *United Carolina Bank v. Board of Regents*, 665 F.2d 553, 562 (5th Cir.1982); *Baker v. Norman*, 651 F.2d 1107, 1121 (5th Cir.1981)).

28. *Harlow v. Fitzgerald*, 457 U.S. at 818, 102 S.Ct. at 2738.

29. *See In re Search Warrant*, 810 F.2d 67, 71 (3d Cir.1987).

30. *United States v. United States District Court, E.D. Mich.*, 407 U.S. 297, 318, 92 S.Ct. 2125, 2137, 32 L.Ed.2d 752 (1972).

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copying. As the district court determined below, the patients have shown no basis to believe that "an opportunity would not be made available to [Dr. Burzynski] to secure a copy of those documents in sufficient time to treat his patients effectively...."

In sum, the federal employees involved in obtaining the warrant for the search of the business premises occupied by Dr. Burzynski and in executing that warrant followed established constitutional procedures. They violated no norms of clearly established law. As federal agents performing discretionary functions within the scope of their duties, they were entitled to qualified immunity shielding them from liability for their acts. The district court's dismissal of the constitutional claims against the federal employees was therefore proper.

IV. Injunctive Relief

The counterclaims requested injunctions requiring return of the records seized pursuant to the search warrant, prohibiting use of the seized records by the government, prohibiting government contact with patients and their insurance carriers, prohibiting the government from interfering with Dr. Burzynski's treatment of the patients with antineoplastons, and prohibiting the government from disseminating allegedly false or misleading information regarding antineoplastons.

A. Return of the Seized Records

Fed.R.Crim.Proc. 41(e) provides the avenue by which a person may obtain return of property seized by the government. Because neither Dr. Burzynski nor the patients stated any basis for a finding that the records were illegally seized and the patients did not even allege a basis for finding that were entitled to lawful possession of the records, the district court was required to dismiss the injunctive claims for return of the records, whether under Rule 41(e) or its general equity jurisdiction.

Both the patients and Dr. Burzynski acknowledged that the medical records were seized from Dr. Burzynski's business premises. On appeal, the patients state that their "property interest [is] in the information contained in their medical treatment records." Thus, the patients' own allegations demonstrate that they were not "entitled to lawful possession of the property" which was seized and, therefore, that they did not have standing to seek return of the seized records.

Since the medical records were seized from Dr. Burzynski's business premises, the patients would have had standing to challenge the search and seizure only if they had a "legitimate expectation of privacy in [those] premises," a business belonging to others.[31] Even if the seized medical records had been the property of the patients, "[t]he fact that [their] property became the 'target' of the search is irrelevant."[32]

[9] The patients attempt to ground their asserted privacy interest in their medical records on a physician-patient privilege as codified in Texas state law, Tex. Rev.Civ.Stat.Ann. art. 4495b § 5.08(b) (Vernon Supp.1985). The seizure of the records, however, took place pursuant to a search warrant as part of a criminal investigation, and was therefore exempt from the Texas shield. In the context of federal criminal proceedings, no physician-patient privilege exists.[33] Therefore, the patients had no legitimate expectation of privacy in the records maintained by Dr. Burzynski that could be asserted against the search warrant and no standing to seek the return of the records.

[10] Even if the patients had alleged circumstances sufficient to afford them standing to seek return of the medical records, they alleged no basis on which the district court could have found the seizure of the records unlawful. The patients ar-

31. *Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir.1984).

32. *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 426–27, 58 L.Ed.2d 387 (1978)).

33. *United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert. denied*, 429 U.S. 853, 97 S.Ct. 146, 50 L.Ed.2d 128 (1976); *United States v. Mancuso*, 444 F.2d 691, 694–95 (5th Cir.1971).

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gue that their sole challenge to the warrant authorizing the seizure was to the face of the warrant, not the supporting affidavit. Yet the only specific deficiency alleged by the patients was that the warrant authorized the seizure of virtually all medical records at the Institute while the supporting affidavit stated that patients' true home addresses were recorded only on patient billing and insurance records. The patients' argument rests on the premise that the only purpose of the warrant was to "ascertain evidence of interstate shipment of antineoplastons." The warrant was sought, however, to authorize the seizure of evidence of numerous criminal offenses in addition to interstate distribution of antineoplastons. Since the seized medical records were relevant to all of those possible violations the warrant was facially valid, and the patients stated no basis for the district court to find seizure of the medical records unlawful, a prerequisite to mandating their return.[34]

Unlike the patients, Dr. Burzynski did attack the affidavit supporting the warrant. However, he neither alleged nor proved a single fact on which the district court could have found the affidavit deficient and the resulting warrant and seizure unlawful.

B. Use of the Seized Records

[11] Both the patients and Dr. Burzynski seek to enjoin the government from providing the records seized pursuant to the search warrant to any other agents or agencies of the United States Government or to any commercial entity or to any other entity or person. While not alleging any basis to believe that the government had made improper use of the seized records or was likely to do so, Dr. Burzynski and the patients sought an injunction that, if granted, would have totally prevented the government from pursuing its criminal investigation of Dr. Burzynski insofar as the seized records constituted evidence of crimes or suggested avenues of investigation.

As an incident to the separation of powers founded in the Constitution, "the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." [35] Furthermore, to the extent that an injunction against providing the seized documents to "any other person or entity" would prohibit presenting the documents to a grand jury, such an injunction would improperly interfere with the mission of the grand jury which "must be free to pursue its investigations unhindered by external influence or supervision...." [36] "The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime 'unless on a presentment or indictment of a Grand Jury.' This constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge....'" [37]

Since neither Dr. Burzynski nor the patients alleged even one arguably improper use of the seized records, the district court had no proper choice but to dismiss the requests to enjoin use of the seized records by the government.

C. Communications with Patients or Insurance Companies

[12] Similarly, the requests of Dr. Burzynski and the patients that the government be enjoined from communicating with Dr. Burzynski's present and former patients and their insurance carriers, would, if granted, have impeded or totally frustrated the government's ability to pursue its investigation of, among other things, interstate distribution of antineoplastons, fraudulent over-billing and double-billing of insurance companies, and false statements to the government. Such an injunction

34. Fed.R.Crim.P. 41(e).

35. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767 (1965).

36. *United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973).

37. *Id.* at 16, 93 S.Ct. at 772 (quoting *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960)).

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would obviously have interfered with "the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." [38]

D. Alleged Interference with Treatment of Patients and Dissemination of False Information

Dr. Burzynski and the patients also asked the district court to enjoin the government from interfering with Dr. Burzynski's treatment of the patients with antineoplastons, both intrastate and interstate.

[13] The interference alleged included the seizure of patient records pursuant to the search warrant, the refusal of the FDA to grant investigational new drug status (IND) to the form of antineoplastons Dr. Burzynski is currently using, and the dissemination of false or misleading information about Dr. Burzynski and his treatment to insurance companies and current or prospective patients. Many of these claims are patently groundless. Just as the allegations of unlawful seizure of patient records cannot support injunctive relief requiring return of the seized records, they cannot form a cognizable basis for claiming that the government has or would interfere impermissibly with Dr. Burzynski's treatment of patients solely within the State of Texas. There simply has been no genuine issue of such a threat raised.

[14] Similarly, neither Dr. Burzynski nor his patients have alleged facts suggesting that the FDA has acted improperly by denying antineoplaston A10 IND status. Although, in his brief before this court, Dr. Burzynski contends that he has never argued that he is entitled to IND status for his new drug but only that the FDA has treated his application differently than other IND applications, the language of his counterclaims belies that assertion. In his countercomplaint, Dr. Burzynski asserted that "Dr. Burzynski's patients will be irreparably harmed if this Court [the district court] fails to require the FDA to grant IND status to the Antineoplaston A10 compound ... in that many patients who could be helped by the use of antineoplastons will be denied their Constitutional right of access to Dr. Burzynski's treatment...." The district court, therefore, construed his counterclaim correctly.

Dr. Burzynski's own testimony demonstrates that the FDA notified him in February 1984 that it found deficiencies in his IND application and required additional data. He candidly admits that he has neither provided the data requested nor explained to the FDA his reasons for considering that data unnecessary. Thus, he has failed to make a good faith effort to obtain an IND or to exhaust his administrative remedies. His claim for injunctive relief with respect to his IND was, therefore, properly dismissed.[39]

[15] The patients indirectly challenge FDA's action with respect to the IND, alleging that their "constitutional right to travel freely between the states ... is being infringed by the Government and its agents through their continued refusal to allow the interstate distribution and shipment of antineoplastons." Because Dr. Burzynski and his patients have failed to allege facts suggesting that IND status was improperly withheld, this claim was also dismissed properly. Moreover, to the extent that the patients' counterclaim can be construed as a challenge to the authority of the FDA to bar interstate distribution of unapproved drugs, the claim is frivolous.[40]

[16] The patients' separate claim for injunctive relief against interference with interstate distribution of antineoplastons based on the asserted "constitutional right to obtain medical treatment that is encompassed by their right to privacy," was also

38. *United States v. Cox*, 342 F.2d at 171.

39. *See Rutherford v. American Medical Association*, 379 F.2d 641 (7th Cir.1967), *cert. denied*, 389 U.S. 1043, 89 S.Ct. 787, 19 L.Ed.2d 835 (1968).

40. *See United States v. Lebman*, 464 F.2d 68, 73–74 (5th Cir.), *cert. denied*, 409 U.S. 950, 93 S.Ct. 271, 34 L.Ed.2d 220 (1972).

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unsupportable. The patients asserted that they should be free to obtain antineoplastons interstate because of "the unavailability of any other treatment that would be effective in treating their cancer." Similar claims were raised and rejected in *United States v. Rutherford*.[41]

As in the present case, the plaintiffs in *Rutherford* were cancer patients, alleged to be terminally ill, desiring treatment with an unapproved drug, and arguing that the restrictions on interstate distribution of new drugs imposed by the Act should not be allowed to interfere with their access to the drug. The Supreme Court rejected the patients' claims. The Court agreed with FDA that the new drug approval provisions of the Food, Drug, and Cosmetic Act specifically applied to the situation presented.

[17] In one respect, however, the fact that Dr. Burzynski and his patients were denied any opportunity for discovery has unfairly prejudiced their opportunity to allege facts in support of counterclaims that may entitle them to relief. The district court found that at least two statements made by Ewing in response to inquiries about Dr. Burzynski and his treatment were "near to inappropriate," exceeded "his duties and responsibilities as an officer of the FDA," and misled his audience by asserting, as established fact, charges still subject to investigation. The district court also noted that, by showing that such statements were made to at least one insurance company, Dr. Burzynski and his patients demonstrated that "the above conduct has had an impact on their ability to treat patients because over fifty percent of [the Institute's] income is derived from insurance payments." Whether additional examples of such questionable conduct exist and, if so, in numbers justifying injunctive relief can only be discerned through discovery. The claim seeking an injunction to stop the government from disseminating false or misleading information to outside parties, therefore, should not have been dismissed until Dr. Burzynski and his patients had an opportunity to discover the scope of the problem and to provide evidence that an injunction is necessary.

Of course, nothing in this opinion should be construed as suggesting that the FDA acted improperly by expressing its position with regard to the status of antineoplastons, i.e., that they are drugs that may not lawfully be introduced into interstate commerce because they are not approved by the FDA or the subject of an acceptable IND. Such information is not false, misleading, or inaccurate.

The FDA also cannot be required to communicate what the patients view as "favorable" information. According to Dr. Burzynski and some of his patients, relevant "favorable information" is that antineoplaston therapy has proved beneficial to some cancer patients. The views of Dr. Burzynski and his patients, however, do not constitute "favorable" information on which FDA may properly rely. "[W]hen the subject of investigation is the existence of cancer, the personal testimony of the lay sufferer is entitled to no weight...."[42] Furthermore, as the Supreme Court found in *Weinberger v. Hynson, Westcott and Dunning, Inc.*,[43]:

> [FDA's] strict and demanding standards, barring anecdotal evidence indicating that doctors "believe" in the efficacy of a drug, are amply justified by the legislative history [of the Food, Drug, and Cosmetic Act]. The hearings underlying the 1962 Act show a marked concern that impressions or beliefs of physicians, no matter how fervently held, are treacherous.

The Civil Contempt Claim Against the Government and its Employees

[18] The same conduct by the government and its employees alleged as the basis

41. 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979).

42. *United States v. Hoxsey Cancer Clinic*, 198 F.2d 273, 280 (5th Cir.1952), *cert. denied*, 346 U.S. 897, 74 S.Ct. 220, 98 L.Ed. 398 (1953).

43. 412 U.S. 609, 619, 93 S.Ct. 2469, 2478, 37 L.Ed.2d 207 (1973) (footnote omitted).

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for the damages and injunctive claims of Dr. Burzynski and the patients formed the basis of their requests to hold the government and its employees in civil contempt. Dr. Burzynski and the patients apparently do not appeal from the dismissal of their civil contempt claims. Their briefs to this court assign no error to the dismissal of those claims. But, even if they do appeal this ruling, the requests for a finding of civil contempt were also without foundation, and the district court's dismissal of those claims was proper.

The permanent injunction, of which the government and its employees were alleged to be in contempt, imposed no restrictions or obligations on the government or its employees, except that FDA was directed to review, evaluate, and appraise the manufacturing practices of the Burzynski Research Institute and promptly advise Dr. Burzynski of any violations of current good manufacturing practices. Although neither Dr. Burzynski nor the patients raised that issue in their counterclaims as a basis for a contempt citation or any other relief, the issue was raised at the hearing on Dr. Burzynski's motion for a temporary restraining order. However, as the record shows, FDA has advised Dr. Burzynski of its position with respect to his manufacturing practices, and so is in compliance with its obligations under the permanent injunction.

VI.

The patients who appear in this suit are in a critical plight. They seek any treatment that offers them the slightest hope, for they think it better to exhaust any possibility than to resign themselves to a fate that seems otherwise certain. The FDA has been assigned the duty of protecting such desperate persons from deception, abuse, and exploitation and of assuring that the treatment they are given is safe and effective. It cannot perform these tasks if those professing to offer new cures refuse to work with the system and obey the law, whether their motives be noble or ill. This court, therefore, must not allow sympathy for the plight of persons suffering from cancer to cause us to interfere hastily with the mission of FDA or to distract us from our duty to uphold the law.

For the reasons given, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

OWENSBY & KRITIKOS, INC., Petro-Marine Engineering, Inc. & Subsidiaries, John W. Owensby & Dolores G. Owensby, Theodore A. Kritikos & Be Jo Kritikos, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 86-4073.

United States Court of Appeals, Fifth Circuit.

June 26, 1987.

Two shareholder employees of three closely held corporations disputed determination of Commissioner of Internal Revenue that amounts paid to the individuals exceeded reasonable compensation for services. The United States Tax Court found that amounts paid as compensation for two taxable years were in part unreasonable. Taxpayers appealed. The Court of Appeals, Wisdom, Circuit Judge, held that finding that compensation paid to individuals in part constituted a dividend, rather than compensation for services rendered, was not clearly erroneous.

Affirmed.

1. Internal Revenue ⇐3321, 3323

A corporation may deduct compensation paid to employees only to the extent it

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either a clear probability or well-founded fear of persecution. The applications for withholding of deportation and political asylum were properly denied.

DENIED.

Jose J. OLAGUES, on Behalf of himself and all others similarly situated, Plaintiffs-Appellants,

v.

Joseph P. RUSSONIELLO, individually and in his capacity as United States Attorney for the Northern District of California, et al., Defendants-Appellees.

Jose J. OLAGUES, on Behalf of himself and all others similarly situated; Hispanic Coalition for Human Rights, Chinese for Affirmative Action, and San Francisco Lation Voter Registration Education Project, Plaintiffs-Appellants,

v.

Joseph P. RUSSONIELLO, individually and in his capacity as United States Attorney for the Northern Ca; O'Malley, William A., individually and in his capacity as District Attorney for Contra Costa County; Underwood, Lon, individually and in his capacity as registrar of voters for Contra Costa County; Smith, Arlo, individually and in his capacity as District Attorney for San Francisco County, et al., Defendants-Appellees.

Nos. 82-4427, 83-2581.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 12, 1984.

Decided Sept. 3, 1985.

Citizen and organizations promoting voting rights of Americans with ethnic backgrounds sued for damages and declaratory injunction relief arising from a preliminary investigation into possible violations of the Voting Rights Act. The United States District Court for the Northern District of California, Spencer Williams and Stanley A. Weigel, JJ., dismissed injunction claims and granted summary judgment in favor of the United States Attorney and county officials. Appeal was taken. The Court of Appeals, Wallace, Circuit Judge, held that: (1) the citizen did not have standing to challenge the investigation, but the organizations did; (2) there were no extraordinary circumstances to warrant injunctive relief; (3) the organizations were not entitled to a declaratory judgment; (4) there was not basis for an injunction against county officials which would, in effect, enjoin the United States Attorney from pursuing his investigation; and (5) there was no implied private action under the Voting Rights Act for damages.

Affirmed.

Nelson, Circuit Judge, concurred in part and dissented in part with opinion.

1. Federal Courts ⇐12

Claims for equitable relief become moot when challenged activity ceases if subsequent events show that activities could not reasonably be expected to recur, unless there is possibility of continuing, present adverse effects.

2. Federal Courts ⇐12

Voluntary cessation of challenged activity by government official is insufficient to render case moot if legality of challenged practices is still in dispute because official is free to return to his old ways.

3. Federal Courts ⇐12

Case or controversy for purposes of Article III may remain live following cessation of challenged activity if actions are capable of repetition and of evading review. U.S.C.A. Const. Art. 3, § 1 et seq.

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4. Federal Courts ⇐13.20

Action challenging investigation by United States Attorney as to whether registered voters were American citizens was not rendered moot by Attorney's termination of investigation where Attorney terminated investigation solely because it failed to produce evidence supported any further investigative activities, Attorney argued vigorously that his actions were lawful and there was no showing that investigation conducted in same manner against same groups would not recur. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Injunction ⇐114(2)

Citizen did not have standing to seek to enjoin prosecutorial activities concerning whether noncitizens were registered to vote where possibility that voter registration records would again be scrutinized was entirely speculative and no official action was taken other than verifying citizenship status of voters.

6. Injunction ⇐114(2)

Organizations which conducted voter registration drive among ethnic groups had standing to challenge investigation into whether registered voters were citizens where they alleged that their voter registration and education efforts had been hindered as direct result of challenged investigation, organizations asserted that both they and their members were threatened with possible prosecution, interests organization sought to protect were "germane" to their purposes and relief sought did not require participation of individual members in suit. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Injunction ⇐126

Although case may not be moot, plaintiff still has burden of showing that equitable relief is necessary and mere possibility of future injury is insufficient to enjoin official conduct.

8. Federal Courts ⇐814

There must be strong showing of abuse of discretion to overturn denial of injunctive relief against official conduct.

9. Injunction ⇐110

District court had jurisdiction over complaint seeking to enjoin preliminary investigation of United States Attorney into whether registered voters were citizens.

10. Administrative Law and Procedure ⇐701

District court has no power to monitor executive investigations before case or controversy arises.

11. Injunction ⇐105(1)

There were no extraordinary circumstances to justify injunctive relief against investigation by United States Attorney into citizenship status of recently registered, foreign-born voters.

12. Constitutional Law ⇐213.1(1)

Language-based classification is not equivalent of national origin classification and does not denote suspect class requiring heightened scrutiny. U.S.C.A. Const. Amend. 14.

13. Constitutional Law ⇐82(8)

Although voting is considered fundamental right, no "burden" was placed on anyone's right to vote by United States Attorney's preliminary investigation into citizenship status of recently registered foreign-born voters so as to require heightened scrutiny. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⇐82(8)

United States Attorney's investigation into citizenship status of recently registered foreign-born voters and circumstances surrounding their registration did not violate First Amendment rights of organizations which conducted registration drives among ethnic groups. U.S.C.A. Const.Amend. 1.

15. Constitutional Law ⇐213.1(2)

When no "suspect class" is involved and no fundamental right is burdened, rational-basis test is used to determine legitimacy of classification. U.S.C.A. Const. Amend. 14.

16. Elections ⇐324

Voter fraud investigation limited to recently registered foreign-born voters seek-

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ing bilingual ballots was reasonably limited in both its scope and its use of classifications. U.S.C.A. Const.Amend. 14.

17. Injunction ⇐138.78

Organizations which conducted voter registration drives among ethnic groups were not entitled to preliminary injunction against United States Attorney's investigation into possible voter fraud resulting from registration of noncitizens.

18. Declaratory Judgment ⇐5

Decision whether to grant declaratory relief is within sound discretion of district court. 28 U.S.C.A. §§ 2201, 2202.

19. Declaratory Judgment ⇐4

Declaratory relief may be appropriate even when injunctive relief is not. 28 U.S.C.A. §§ 2201, 2202.

20. Declaratory Judgment ⇐84

Organizations which conducted voter registration drives among ethnic groups were not entitled to declaratory judgment against investigation of citizenship status of recently registered foreign-born voters seeking bilingual ballots where organizations were not generally hindered from pursuing their lawful voter registration activities at time of imminent criminal prosecution. 28 U.S.C.A. §§ 2201, 2202.

21. Injunction ⇐105(1)

Where county officials forwarded names of recently registered foreign-born voters who requested bilingual ballots at specific request of United States Attorney, who was investigating possible voter fraud, there was no basis for injunction against county officials which would, in effect, enjoin United States Attorney from pursuing his investigation.

22. Elections ⇐12(4)

There was no violation of Voting Rights Act [42 U.S.C.A. § 1971(b); Voting Rights Act of 1965, §§ 11(b), 203, as amended, 42 U.S.C.A. §§ 1973i(b), 1973aa–1a] in county officials' conduct of forwarding names of recently registered foreign-born voters who requested bilingual ballots to United States Attorney as part of investigation into citizenship status of those voters where there was no intent to intimidate voters.

23. Elections ⇐12(9)

There is no implied private right of action for violations of Voting Rights Act. 42 U.S.C.A. § 1971(b); Voting Rights Act of 1965, §§ 11(b), 203, as amended, 42 U.S.C.A. §§ 1973i(b), 1973aa–1a.

24. Civil Rights ⇐13.8(3, 6)

United States Attorney and county officials who participated in investigation of recently registered foreign-born voters who requested bilingual ballots, for purposes of determining whether voter fraud occurred, were entitled to at least qualified, good-faith immunity from liability under civil rights statute. 42 U.S.C.A. § 1983.

Joaquin G. Avila, Ronald T. Vera, Alan L. Schlosser, American Civil Liberties Union, San Francisco, Cal., and Kathleen A. Pool, California Rural Legal Assistance, Marysville, Cal., for plaintiffs-appellants.

William T. McGivern, and John D. O'Connor, Tarkington, Carey, O'Connor & O'Neill, San Francisco, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before WALLACE, ALARCON, and NELSON, Circuit Judges.

WALLACE, Circuit Judge:

Olagues, a citizen, and certain organizations promoting the voting rights of Americans with Hispanic or Chinese ethnic backgrounds in the San Francisco Bay area (the organizations) sued for damages and declaratory and injunctive relief arising from a preliminary investigation by the United States Attorney and various state officials into possible violations of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(c), (d) (the Act), which prohibits the illegal registration of voters or conspiracies to illegally register voters. Olagues and the organiza-

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tions claim violations of their rights under the Act and the first, fifth, fourteenth, and fifteenth amendments to the Constitution. The district court dismissed the injunctive claims on the ground that it lacked jurisdiction to enjoin an investigation by the United States Attorney. The district court also granted summary judgment in favor of the United States Attorney and the state officials on the remaining claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In March and April of 1982, United States Attorney Russoniello received information from the Santa Clara County district attorney indicating that a substantial number of foreign-born individuals who had recently registered to vote were not United States citizens. The information was contained in a study of recent voter registrants whose primary language was not English. Many of the noncitizen registrants apparently believed or were told that they were entitled to vote on the basis of marriages to United States citizens or a long period of residence in the United States. Russoniello also was informed that the Spanish translation of the voter registration form erroneously stated that registrants "should be" a United States citizen, rather than stating one "must be" a citizen.

Russoniello then sent a letter on April 19, 1982, to law enforcement officers and voter registrars in nine local counties within his jurisdiction requesting their cooperation in obtaining a sampling of names from voter registration lists in order to determine whether the improper registration problem noticed in Santa Clara County was more widespread. The letter requested the forwarding of 25 names, randomly selected, of recently registered, foreign-born voters who requested bilingual ballots. The letter indicated that upon receipt of the sampling, the names would be forwarded to the Immigration and Naturalization Service (INS) to determine each individual's citizenship status. He recommended that those individuals who the INS indicated were not citizens be interviewed thereafter. Russoniello stated that he did not intend to prosecute any improperly registered voters, but that he would consider prosecuting individuals who deliberately conspired to register unqualified voters if evidence of such impropriety surfaced.

The local officials responded by forwarding the names of 168 persons, one of whom was Olagues, from the public voting lists which were subsequently checked by the INS. At Russoniello's request, local officials then conducted voluntary interviews with some of the 113 individuals whom the INS could not positively identify as citizens to determine their citizenship and, if the individuals proved not to be United States citizens, the circumstances surrounding their registration. No further investigation occurred.

II

Because the investigation has terminated, we first must determine whether there remains a live controversy for purposes of granting equitable relief. There is no question that a controversy remains with respect to damages.

[1] We begin this analysis with the recognition that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy" for equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (*O'Shea*). Claims for equitable relief therefore become moot when the challenged activity ceases if subsequent events show that the activities "could not reasonably be expected to recur," *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir.1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), unless there is a possibility of "continuing, present adverse effects." *O'Shea*, 414 U.S. at 496, 94 S.Ct. 676.

[2, 3] There is a heavy burden, however, on the defendant to show that there is no reasonable expectation of repetition. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303

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(1953) (*W.T. Grant*). Voluntary cessation of the challenged activity by the official is insufficient to render a case moot if "the legality of the challenged practices" is still in dispute because "[t]he defendant is free to return to his old ways." *Id.* at 632, 73 S.Ct. at 897. *See Allee v. Medrano*, 416 U.S. 802, 810–11, 94 S.Ct. 2191, 2197–98, 40 L.Ed.2d 566 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir.1982) (claim is moot if subsequent "events have completely and irrevocably eradicated the effects of the alleged violation"). Moreover, a case or controversy for purposes of article III may also remain live following cessation of the challenged activity if the actions are capable (1) of repetition and (2) of evading review. *See, e.g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974). Finally, the existence of "a public interest in having the legality of the practices settled ... militates *against* a mootness conclusion." *W.T. Grant*, 345 U.S. at 632, 73 S.Ct. at 897 (emphasis added).

[4] Applying this framework to the case before us, we find several factors pointing toward the continuing existence of a case or controversy for purposes of evaluating plaintiffs' equitable claims. First, the United States Attorney did not voluntarily cease the challenged activity because he felt that the investigation was improper. Rather, Russoniello terminated the investigation solely because it failed to produce evidence supporting any further investigative activities. Russoniello has at all times continued to argue vigorously that his actions were lawful.

Second, there has been no showing that an investigation conducted in the same manner against the same groups would not recur. Although Russoniello and the state officials point out that the Director of the Census now has determined that these counties no longer must provide bilingual ballot materials, *see* 49 Fed.Reg. 25,887–88 (June 25, 1984), Olagues and the organizations correctly observe that election officials in San Francisco, Santa Clara, Alameda and Monterey counties will continue to provide the same bilingual ballot materials as previously required by section 203(b) of the Voting Rights Act, 42 U.S.C. § 1973aa–1a(b). Thus, Russoniello will continue to have the means available to conduct an investigation similar to the one challenged here. It is immaterial that the tools useful for discriminatory purposes are furnished by the state rather than by the federal government; what matters is whether federal officials may utilize them.

[redacted]iello is certainly empowered to investigate election fraud; it would not be unreasonable to believe that a similar investigation might arise at some point in the future. Thus, the same issues are capable of repetition. At the same time, these investigations, such as the one in the present case, may be of very short duration, making them effectively capable of evading review by an appellate court. *E.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 546–47, 96 S.Ct. 2791, 2796–97, 49 L.Ed.2d 683 (1976).

Other factors also suggest a live controversy. The organizations argue that their organizational efforts have been handicapped as a result of the fear engendered by this investigation. They contend that unless the legality of the investigation is determined, they may continue to suffer these chilling effects despite the termination of the initial investigation. Furthermore, there is a significant public interest in addressing both the appropriateness of permitting a challenge to a federal investigation, which raises separation-of-powers concerns, and the appropriateness of the investigatory methods employed, which raises voting rights and first amendment concerns.

This case is distinguishable from *O'Shea* and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (*Lyons*). In *O'Shea*, the plaintiffs challenged certain arrest and bail procedures employed by state law enforcement and judicial officials. In order to be subject to

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these alleged unlawful procedures, however, one would first have had to violate some law and then have been arrested. 414 U.S. at 496, 94 S.Ct. at 676. The Supreme Court found that plaintiffs failed to show any case or controversy because it presumed that plaintiffs would obey the law, and therefore they never would become subject to any unlawful procedures in the future. *Id.* at 497, 94 S.Ct. at 676. Unlike the situation before us, the *O'Shea* plaintiffs did not claim any constitutional right to act as they had prior to their arrest. *See id.* at 498, 94 S.Ct. at 677. In *Lyons*, the plaintiff challenged the use of chokeholds by Los Angeles police on arrestees. The Court again held that there was no case or controversy for equitable relief because whether Lyons would again be arrested and subjected to a chokehold a second time was purely speculative. *See* 461 U.S. at 105–06, 103 S.Ct. at 1667.

Here, Olagues and the organizations claim that the actions of the officials have interfered with their constitutionally protected first amendment activities in registering voters. Unlike *O'Shea* and *Lyons*, neither Olagues nor the organizations had to break any law in order to be subjected to alleged unlawful conduct by the officials. Certainly the legality of the investigation at issue remains in dispute; both sides continue forcefully to advocate their positions. Russoniello has never seriously attempted to make any showing that the challenged investigative techniques will never be employed again; rather, he vigorously defends his investigative tactics. Thus, he fails to meet his "heavy burden" of showing mootness. *W.T. Grant*, 345 U.S. at 633, 73 S.Ct. at 897.

III

We next examine the standing of Olagues, a foreign-born citizen who requested bilingual election materials, and the organizations, which claim that the challenged investigatory activities will "effectively deny their right to participate in the electoral process."

We recently summarized the law relating to standing required by article III of the Constitution:

> Standing is a threshold question in every case before a federal court. Before the judicial process may be invoked, a plaintiff must "show that the facts alleged present the court with a 'case or controversy' in the constitutional sense and that [he] is a proper plaintiff to raise the issues sought to be litigated." A party seeking to invoke the court's authority must demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends...."
>
> The question of whether the plaintiff has standing involves both constitutional and prudential limitations. The constitutional limitations of article III involve three separate but interrelated components: first, a "distinct and palpable" injury to the plaintiff, be it "threatened or actual"; second, a "fairly traceable causal connection" between that injury and the challenged conduct of the defendant; and third, a "substantial likelihood" that the relief requested will redress or prevent the injury.

McMichael [redacted] *County of Napa*, 709 F.2d 1268, 1269–70 (9th Cir.1983) (citations omitted).

[5] Olagues would generally have standing under the Act if he is an "aggrieved person," broadly defined as one who has suffered an injury. *See Allen v. State Board of Elections*, 393 U.S. 544, 554–57, 89 S.Ct. 817, 825–27, 22 L.Ed.2d 1 (1969) (*Allen*). He has alleged an injury: his request for a bilingual ballot triggered an investigation of his records by the FBI and the INS and an interview by the local District Attorney. Juxtaposed against the holding in *Allen*, however, is the general bar against the invocation of federal equity jurisdiction in criminal prosecutions when the plaintiff is not being prosecuted or threatened with prosecution. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19,

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93 S.Ct. 1146, 1148–49, 35 L.Ed.2d 536 (1973); *Younger v. Harris*, 401 U.S. 37, 50–54, 91 S.Ct. 746, 753–55, 27 L.Ed.2d 669 (1971) (*Younger*). In order to harmonize these conflicting strains of precedent arising in this particular factual circumstance, we find it necessary to focus on the nature of the relief sought by Olagues.

Here, Olagues is not seeking any affirmative injunctive relief in order to permit him to vote, such as demanding that he be listed as an eligible voter. Rather, he seeks to enjoin prosecutorial activities which are focused on persons other than himself. Moreover, it does not appear that Olagues has demonstrated that he would suffer irreparable harm without equitable relief. Unlike the organizations, who allege that their current voter registration efforts are being hindered by the fear that they may possibly be subject to a similar investigation in the future, the possibility that Olagues's voter registration records will be scrutinized again is entirely speculative. Olagues thus faces the barrier of *Lyons*, which emphasizes that the irreparable harm showing is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." 461 U.S. at 111, 103 S.Ct. at 1670.

Under these circumstances, we conclude that Olagues has failed to overcome the prudential limitations on standing that are particularly important when evaluating claims for equitable relief regarding a criminal investigation. The injuries he alleges are insufficient to warrant such an intrusive remedy. Since he is a citizen, it cannot be seriously contended that Olagues has been or will be denied his right to vote as a result of an examination of public records. No official action has been taken against him, other than verifying his citizenship status along with those individuals who were initially identified as improperly registered. The principal claim of present injury is that the investigation has had a "chilling effect" on and "stigmatized" him. However, mere "allegations of a subjective 'chill' " do not suffice to present a justiciable claim. *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 2325–26, 33 L.Ed.2d 154 (1972). We need not pass on the "stigma" claim as a basis for standing. The only time it could have arisen was after public disclosure that the investigation was taking place, which apparently was self-induced by the filing of this lawsuit. In the absence of standing to pursue equitable relief, Olagues' individual claim for relief is therefore relegated to one for damages only for any direct injuries which might have occurred as a result of the investigation directed at others. *See Lyons*, 461 U.S. at 111, 103 S.Ct. at 1670 (damage remedy is adequate when there is no showing of future injury).

[6] The organizations' standing requires more extensive analysis. Chinese for Affirmative Action is a voluntary membership group that seeks to protect the rights of Chinese-Americans. It monitors compliance with bilingual election requirements and encourages Asian-Americans to register and to vote. The Hispanic Coalition for Human Rights is an association of Hispanic organizations and persons of Mexican descent, with a goal of securing the civil rights of Hispanics. It encourages them to register and to vote, and advises them on the availability of bilingual election materials. The San Francisco Latino Voter Registration Education Project is a coalition of Hispanic groups that was conducting a voter education and registration drive at the time of the investigation. The organizations allege that the investigation has hindered their efforts to encourage citizens of Hispanic and Chinese ethnic backgrounds to participate in the electoral process and that it was aimed at investigating how they registered voters, thus intimidating them in such activities. They also fear disclosure of their organizational membership. They claim direct injury both to themselves and to their members.

An associational plaintiff has standing to seek redress of direct injury to the organization itself. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 27, 40, 96 S.Ct. 1917, 1919,

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1925, 48 L.Ed.2d 450 (1976) (*Simon*); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975) (*Warth*); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963). Under certain circumstances, an association may also be entitled to seek redress of injury to its members. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342, 97 S.Ct. 2434, 2440, 53 L.Ed.2d 383 (1977) (*Hunt*); *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (*Sierra Club*). In *Hunt*, the Supreme Court established a three-part test to determine whether an association has standing: (1) either the group or its members must have suffered some direct, cognizable injury; (2) the interests the group seeks to protect must be "germane to the organization's purpose"; and (3) the claim or relief sought must not require the participation of the individual members in the suit. 432 U.S. at 343, 97 S.Ct. at 2441. A mere "abstract concern," *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925, or "special interest" in a public issue, *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1368, however, is legally insufficient to confer standing.

The organizations claim standing on two grounds. First, they assert a direct injury: their voter registration and educational efforts have been hindered as the direct result of the challenged investigation, in violation of their first amendment and associational rights. They claim that the investigation has discouraged members from participating in their associational activities and that it will lead to disclosure of organizational membership, thus undermining their voter education and registration efforts. Because the investigation involved questioning of voter registrants as to who had assisted them in registering, they contend, it inherently delved into their associational activities and membership in violation of their constitutional rights.

Second, the organizations assert that both they and their members are threatened with possible prosecution for violations of the Voting Rights Act. They cite Russoniello's letter as evidence that such prosecution was possible. They further assert that they are undoubtedly the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register.

A preliminary issue is whether the investigation may be fairly characterized as having been "targeted" at these organizations or their members. The investigation sought to determine whether there existed any unlawful conspiracies to register ineligible foreign-born voters. The random sample of voters employed focused solely on foreign-born registrants who sought bilingual ballots. Russoniello's letter indicates that groups targeting citizens of Chinese and Hispanic ethnic backgrounds were the source of his concern. Although he stated that he did not challenge their right to conduct registration drives, he did not disavow future prosecutions against persons conspiring to register noncitizens. When any voter whose name was chosen at random initially appeared to be unqualified, he sought follow-up questioning to determine who registered the voter and what representations had been made as to the qualifications necessary to vote. It is not difficult to conclude from this fact that the investigation was sufficiently "targeted" at the organizations and their members for purposes of our analysis. Their principal activities were directed specifically at registering and counseling voters who would fall within the classification on which the investigation was based. That they were not specifically named as targets does not change this conclusion.

We now analyze these organizations' standing under *Hunt*'s three-part test. The first hurdle is whether the groups or their members may have suffered any direct, cognizable injury. We conclude that the organizations' allegations raise sufficient claims of potential direct injury to both themselves and their members. The Supreme Court has recognized previously that a group may have standing even if it is only derivatively injured as the result of

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the prosecution or threat of prosecution of its members. *See Allee v. Medrano*, 416 U.S. 802, 829–30 & n. 6, 94 S.Ct. 2191, 2207 & n. 6, 40 L.Ed.2d 566 (1974) (Burger, J., concurring in part and dissenting in part). In the case before us, the organizations' voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials; whether the investigation actually involved any unwarranted intrusions into their associational activities solely affects the merits of their claim, not their standing. Moreover, unlike Olagues, members who participated in the organizations' counseling activities and voter registration drives are potential targets of future prosecutions. Thus, the bar to invocation of federal equity jurisdiction faced by a plaintiff who is not being prosecuted or threatened with prosecution is not applicable. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The next inquiry is whether the interests the organizations seek to protect are "germane" to the purposes of the organizations. *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. We conclude that they are. The organizations' activities are centered on voter education and registration. Such activities are directly related to the individual members' interests in pursuing counseling and registration of voters free from unwarranted prosecutorial intrusions.

Finally, the relief sought by the organizations does not require the participation of individual members in the suit. The principal claims are for injunctive and declaratory relief; such equitable relief is particularly suited for group representation. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Thus, we conclude that the organizations have standing.

IV

[7, 8] Although a case may not be moot, a plaintiff still has the burden of showing that equitable relief is necessary, *see W.T. Grant*, 345 U.S. at 633, 73 S.Ct. at 897, and the mere possibility of future injury is insufficient to enjoin official conduct. Moreover, there must be "a strong showing of abuse" of discretion to overturn a denial of such relief. *Id.* We also keep in mind the Supreme Court's admonition that any injunction regarding government functions is generally only permitted in "extraordinary circumstances," *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976), as officials should be given the "widest latitude" possible while performing their official duties. *Id.* at 378, 96 S.Ct. at 607.

[9] The organizations seek to enjoin a preliminary investigation of a United States Attorney. The district court dismissed the organizations' complaint on the grounds that "as a matter of law," it lacked "jurisdiction to enjoin or otherwise control" such an investigation. We review the legal question of jurisdiction de novo. *E.g., United States v. Oregon*, 718 F.2d 299, 303 & n. 5 (9th Cir.1983). The district court erred in its ruling that it lacked jurisdiction. *See, e.g., Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (*Jett*).

[10] We have recognized, however, that as a general proposition, a district court has no "power to monitor executive investigations before a case or controversy arises." *Jett*, 578 F.2d at 845. *See also United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) ("courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions"), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). We emphasized that intrusions into the investigative process of a United States Attorney present "difficult problems of separation of powers." *Jett*, 578 F.2d at 845. We therefore recognized that only in extraordinary circumstances would we entertain an action to enjoin a prosecutor's investigatory activities. *See id.* ("prosecutor may be subject to a suit to enjoin egregiously illegal conduct"). *See also United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) ("a court may not exercise its 'supervisory power' in a

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way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so," because of separation of powers constraints), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977) (*Chanen*).

[11] The organizations alleged that the United States Attorney lacked a reasonable basis for initiating the investigations. The district court should therefore have determined whether any extraordinary circumstances were present. Because we may affirm the district court's ruling on any basis fairly presented by the record, however, *see Keniston v.* [redacted] 717 F.2d 1295, 1300 n. 3 (9th Cir.1983), we consider whether there were extraordinary circumstances, *Jett*, 578 F.2d at 845, present requiring injunctive relief. We conclude that no extraordinary circumstances are suggested in the record, as indicated in our discussion in Part [redacted] Because we hold that injunctive relief would not be appropriate, we need not determine whether, as Olagues and the organizations claim, an action for such relief may lie against federal officials under the Act itself.

Other courts have been equally reluctant to intrude into the sphere of prosecutorial authority. *See Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C.Cir.1978) ("Only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations."), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979) (*Reporters Committee*); *LaRouche v. Webster*, 566 F.Supp. 415, 417 (S.D.N.Y.1983) ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden") (*LaRouche*); *accord In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala.1980); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D.Ill.1964).

Only one court has actually found the presence of sufficiently extraordinary circumstances. In *Pollard v. Roberts*, 283 F.Supp. 248 (E.D.Ark.), *aff'd*, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (per curiam), the district court enjoined the enforcement of a subpoena requiring the disclosure of contributions to a political party. Such disclosure of what was then considered confidential data would have resulted in immediate, irreparable harm to the plaintiffs' clear first amendment interests. As a result, the court placed a minimal burden on the prosecutor to show that the subpoena was rationally related to a legitimate investigation, 283 F.Supp. at 256, a burden that he failed to meet. *Id.* at 257.

Courts have rejected attempts to interfere with an investigation by a United States Attorney in two similar instances. In *LaRouche*, contributors and organizations supporting a Congressman sued for injunctive and declaratory relief in regard to an investigation into his campaign. The investigation was triggered by a series of newspaper stories indicating potentially illegal campaign financing activities. Plaintiffs argued that the investigation was in bad faith with the intention of both chilling the plaintiffs' exercise of their first amendment rights of association and discouraging future contributions. The United States Attorney's activities had been limited to questioning various contributors. After noting the "almost insurmountable burden" plaintiffs faced, the district court emphasized that: "The decision to investigate, like the decision to prosecute, is one which the Constitution places in the executive branch. The constitutional separation of powers prevents the courts from interfering with the exercise of prosecutorial discretion except under the rarest of circumstances." 566 F.Supp. at 417. That court limited its review to a determination of whether there was "reasonable cause to believe that criminal activity may have taken place." *Id.* at 418. Beyond that, the court held that it was not its function to examine the "wisdom" or "motives" behind the decision to investigate. *Id.* In denying all of plaintiffs' claims for relief, the court found that the mere "*possibility* of criminal activity" as alleged in the newspaper articles was "sufficient to justify a criminal investigation." *Id.* Because the plaintiff

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made no showing of future investigatory misconduct, an injunction with respect to future investigations was also denied. *Id.* at 419. As to the fear that first amendment rights were being chilled, the court emphasized that the "compelling governmental interest in investigating possible" crime overrode such interests and that "the mere asking of material questions does not constitute a First Amendment violation." *Id.* at 418. *See also Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 877–78 (D.C.Cir.1979) (reasonable questioning by Commission agents about campaign contributions does not chill first amendment rights), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

Reporters Committee involved two newspapers which sought injunctive and declaratory relief from a telephone company policy of providing toll call records to law enforcement officials, claiming first and fourth amendment violations. The court held that the first amendment provided no additional "shield" respecting privacy interests beyond the fourth amendment's protection in the context of a good faith criminal investigation. 593 F.2d at 1054–55, 1058. The court emphasized the "particularly heavy burden" on plaintiffs demanding equitable relief in such circumstances dictated by separation of powers concerns, *id.* at 1065, and that mere speculation as to irreparable harm would not suffice. *Id.* at 1067. In order to meet the burden, plaintiffs would have to establish "a *clear and imminent* threat of future [prosecutorial] misconduct." *Id.* at 1071.

▌

Plaintiffs urge that the preliminary investigation in this case should be reviewed by this court with "heightened scrutiny" because it focused on a "suspect class" and because a fundamental right is burdened. We disagree.

[12] Initially, the organizations argue that a classification based on an individual's choice of language is a form of discrimination based on race or national origin. No court has yet held that a language-based classification is the equivalent of one based on race or national origin requiring heightened scrutiny as a "suspect class." Indeed, those courts which have faced this issue have held that language-based classifications are not the equivalent of national origin classifications. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983), *cert. denied*, — U.S. —, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219–20 (6th Cir.1975); *see also Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) ("Neither [Title VII] nor common understanding equates national origin with the language one chooses to speak."), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). We agree with these courts and hold that a language-based classification is not the equivalent of a national origin classification, and does not denote a suspect class.

Unlike race, place of birth, or sex, language is not one of those "immutable characteristic[s] determined solely by the accident of birth" which typically are the basis for finding a suspect class. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). Although our first choice of language may be initially determined to some extent "by the accident of birth," *id.*, we remain free thereafter to choose another should we decide to undertake the initiative. Indeed, bilingualism or multilingualism is hardly an extreme rarity today, as Olagues's own bilingualism exemplifies. Moreover, even if a significant percentage of those speaking a particular language can be shown to be of one "discrete and insular" racial or ethnic minority, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938), not all persons speaking that language would be so situated. The court would thus face the problem of blurred lines defining those persons entitled to heightened protection from use of the challenged classification, with the possibility of overbroad protection leading to the striking down of otherwise rationally based official action. The orga-

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nizations' request therefore urges us "to extend its most exacting scrutiny to review [government action] that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor" of language. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973). We agree that within a society "of multitudinous origins, customs, tongues, beliefs, and cultures, ... [i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall*, 413 U.S. 634, 657, 93 S.Ct. 2842, 2865, 37 L.Ed.2d 853 (1973) (Rehnquist, J., dissenting). We therefore decline to equate one's choice of language with one's race or national origin, classification on the basis of which would require exacting scrutiny.

[13] Heightened scrutiny is also appropriate if a fundamental right is burdened, and voting is considered a fundamental right. *E.g., Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). It is difficult to see how any "burden" was placed on anyone's right to vote, however, since no individual citizen was denied his right to vote. Russoniello's preliminary inquiry was aimed at ferreting out potential voting fraud, in order to enhance the right to vote of those who qualified. Individual citizens who were initially identified as not qualified thereafter were only the subject of narrowly confined, noncoercive follow-up interviews probing potentially unlawful activities of others. Even if we construe this as a "burden," it is a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct.

[14] The organizations' first amendment claims are equally lacking in substance. Whatever incidental burden (if any) on their associational rights which may have occurred must give way to the government's need to ensure the sanctity of the polls. *See, e.g., LaRouche*, 566 F.Supp. at 418 ("associational rights ... [often] must give way to compelling governmental interests in investigating possible criminal activity"). Investigative activity inherently "affects or 'implicates' First Amendment activity." *Reporters Committee*, 593 F.2d at 1059 (emphasis omitted). The review of public records cannot involve any violation of first amendment rights. Moreover, the follow-up questioning of potential witnesses also is lawful. *See, e.g., Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 877–78 (D.C.Cir.1979) (upholding questioning of campaign contributors regarding illegal contributions), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *LaRouche*, 566 F.Supp. at 418 ("As long as reasonable cause to investigate exists, the mere asking of material questions does not constitute a First Amendment violation.").

[15, 16] When no "suspect class" is involved and no fundamental right is burdened, a rational basis test is used to determine the legitimacy of the classification. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 311–12, 96 S.Ct. 2562, 2565–66, 49 L.Ed.2d 520 (1976) (per curiam). Here, the scope of the investigation was limited to recently-registered foreign-born voters seeking bilingual ballots. The impetus for the investigation was a study indicating problems with persons whose primary language was other than English, in part because of mistranslations in the Spanish language applications. The initial review was randomly based among this group in order to readily obtain some indication of the scope of any impropriety. When no significant level of impropriety was noticed, the investigation was terminated. Thus, it appears to have been reasonably limited in both its scope and its use of classifications.

We realize that the separation of powers doctrine does not require us to ignore any and all activities by executive officials regardless of whether their actions constitute clear violations of individual rights. At the same time, however, even the organizations recognize that a United States Attorney is entitled, indeed required, to conduct an investigation into allegations of voting fraud. They only quarrel with the scope and man-

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ner of the investigation subsequently undertaken. But ours is not the role of a "super prosecutor" empowered to monitor all prosecutorial activities on a day-to-day basis, absent compelling, extraordinary circumstances. *Chanen*, 549 F.2d at 1312–13.

[17] We only hold that on the facts of this case, no such extraordinary circumstances exist warranting intrusion into the actions of the executive branch. This is not to say that the organizations' charges are not serious; we reach this conclusion only after careful scrutiny of the record before us. We are compelled, however, to refrain from injecting ourselves into the midst of what essentially was only an embryo of an investigation. A narrowly focused preliminary inquiry using public records was undertaken in order for the United States Attorney to determine whether a problem even existed. Without the ability to make such a narrow inquiry, in the face of a study indicating potentially significant voter registration problems, the United States Attorney would be deprived of the information he needs to perform his duties. The organizations would have us either forbid any preliminary investigation, or mandate one of significantly broader scope. But matters such as the scope of a preliminary investigation are delegated to the sound discretion of the executive branch.

VI

[18] The organizations also sought declaratory relief. The district court dismissed this claim without elaborating its reasons. The decision whether to grant declaratory relief is within the sound discretion of the district court. *See, e.g., Doe v. Gallinot*, 657 F.2d 1017, 1024–25 (9th Cir.1981).

[19] Declaratory relief may be appropriate even when injunctive relief is not. *See Steffel v. Thompson*, 415 U.S. 452, 469, 94 S.Ct. 1209, 1220, 39 L.Ed.2d 505 (1974) (*Steffel*). There is a considerable difference between *ordering* a government official to conduct his activities in a certain manner, and simply *pronouncing* that his conduct is unlawful and *should* be corrected. Nevertheless, there remains the concern that an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation, *see Samuels v. Mackell*, 401 U.S. 66, 72, 91 S.Ct. 764, 767, 27 L.Ed.2d 688 (1971) (*Samuels*), even though the investigative techniques may not be identical. Therefore, if declaratory relief based on a lesser showing leads to an injunction, the distinction between the two types of relief would be lost, despite the strong policy disfavoring such disruptive relief which we previously outlined. *See Steffel*, 415 U.S. at 481–82 & n. 3, 94 S.Ct. at 1226–27 & n. 3 (Rehnquist, J., concurring) (expressing concern over potential use of declaratory relief as a bootstrap).

[20] Thus, the Supreme Court has recognized that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of" law enforcement activities as an injunction, *Samuels*, 401 U.S. at 72, 91 S.Ct. at 767, and therefore " 'the practical effect of [injunctive and declaratory] relief will be virtually identical.' " *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975), *quoting Samuels*, 401 U.S. at 73, 91 S.Ct. at 768. Notwithstanding the difference in effect between injunctive and declaratory relief, we conclude that the same general equitable principles should apply here in determining whether to grant declaratory relief as to the lawfulness of Russoniello's investigation. *See Samuels*, 401 U.S. at 73, 91 S.Ct. at 768.

The central purpose of the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, is to provide parties with a declaration of their rights prior to incurring actual injury. In the typical case requesting declaratory relief with respect to law enforcement officials, a declaration of rights is sought with respect to a party's ongoing or intended conduct in light of existing criminal statutes. The party desires a declaration that

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his conduct is lawful, and therefore may not be interfered with by state or federal officials. *See Steffel*, 415 U.S. at 478, 94 S.Ct. at 1225 (Rehnquist, J., concurring). Declaratory relief thus provides an "alternative to pursuit of the arguably illegal activity." *Id.* at 480, 94 S.Ct. at 1226. Here, however, there is no claim seeking a declaration that the organizations' voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. Thus, the organizations are not seeking any alternative to being forced to continue arguably lawful conduct with the fear of imminent criminal prosecution. *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

In these circumstances, we hold that the district court's denial of declaratory relief was not an abuse of discretion. The organizations were not generally hindered from pursuing their lawful voter registration activities at the risk of imminent criminal prosecution, unlike the restaurant owners in *Doran*. Declaratory relief in this action would raise the same concerns regarding interference with the activities of prosecuting officials that we pointed out in our discussion of injunctive relief.

VII

[21] The separation of powers concerns with regard to equitable relief against a United States Attorney are absent when examining the appropriateness of equitable relief against the county officials. But similar considerations of restraint in ordering such relief arise out of principles of comity and federalism, as emphasized in *Lyons, O'Shea*, and *Younger*. "[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws...." *Lyons*, 461 U.S. at 112, 103 S.Ct. at 1670, *citing O'Shea*, 414 U.S. at 499, 94 S.Ct. at 677, *and Younger*, 401 U.S. at 46, 91 S.Ct. at 751. "[N]ormal principles of equity, comity, and federalism ... should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Lyons*, 461 U.S. at 112, 103 S.Ct. at 1670. Here, the actions of the county officials of which the organizations complain were all performed at the *specific request* of the United States Attorney. Enjoining the county officials' activities would thus, to some effect, enjoin the United States Attorney from pursuing his investigation. Because we find no basis for interfering with the United States Attorney's investigation, we find no basis for equitable relief concerning the means he has to conduct it. *Cf. Gravel v. United States*, 408 U.S. 606, 621, 92 S.Ct. 2614, 2625, 33 L.Ed.2d 583 (1972) (committee counsel gathering information for congressman is entitled to invoke congressional immunity).

[22] Even absent these concerns, the organizations' claims under the Voting Rights Act against these officials do not appear to have merit. Assuming that the search of voting records intimidated bilingual voters, such intimidation would satisfy only one part of a two-pronged test for violations of 42 U.S.C. §§ 1971(b) and 1973i(b): the voters and organizations were intimidated, but the officials did not *intend* to intimidate. *See United States v. McLeod*, 385 F.2d 734, 740–41 (5th Cir. 1967). As we discuss in Part IX, the officials acted in good faith. Although a declaratory judgment for violation of 42 U.S.C. § 1973aa–1a could not be denied on the basis of intent, *see Chinese for Affirmative Action*, 580 F.2d at 1008–09 (good faith is no defense to equitable relief regarding bilingual ballot provisions), there has been no violation of this section, which concerns solely the provision of bilingual ballots. There has been no allegation that bilingual ballots have not been provided in accordance with that section.

VIII

[23] The organizations' First Amended Complaint seeks "statutory damages" under the Voting Rights Act. Pursuant to *Allen v. State Board of Elections*, 393 U.S.

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544, 555, 89 S.Ct. 817, 826, 22 L.Ed.2d 1 (1969), private litigants are held to have an action against state officials for declaratory and injunctive relief under section 5 of the Act, 42 U.S.C. § 1973c.

The Act, however, does not specify any statutory damage remedies. No case has been cited nor have we found one in which damages were recovered. In determining whether to construe an implied cause of action, the principal focus must be on congressional intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377, 102 S.Ct. 1825, 1838, 72 L.Ed.2d 182 (1982). The Act itself limits the recovery of any fine for criminal sanctions to $5,000. *See* 42 U.S.C. § 1973aa–3. The legislative history nowhere suggests any action for damages, but instead observes that a private litigant is entitled to "the same remedy" as the Attorney General, as well as attorneys' fees as in 42 U.S.C. §§ 1981–1988. S.Rep. No. 295, 94th Cong., 1st Sess. 39–43, *reprinted in* 1975 U.S. Code Cong. & Ad.News 774, 806–10. That history points out that "[t]he sole consequence" of the provision for a private cause of action under the Act "is to broaden the scope of *equitable* relief which may be requested" to include the "special remedies" specified in the Act. *Id.* at 49, *reprinted in* 1975 U.S.Code Cong. & Ad. News at 816 (emphasis added).

Moreover, Supreme Court precedent suggests that private plaintiffs are limited to damage actions under 42 U.S.C. § 1983. *See Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944). In *Smith*, plaintiffs were awarded damages for violation of their voting rights under 8 U.S.C. § 31 (now echoed in 42 U.S.C. § 1973), in a suit under 8 U.S.C. § 43 (now codified at 42 U.S.C. § 1983). Equitable relief suffices to fulfill the purpose of the statute, which is to ensure the right to register and vote at the polls. *See, e.g., Webber v. White*, 422 F.Supp. 416, 426 (N.D.Tex.1976) ("the most relief that a federal district court can grant to a private litigant under the *Allen* interpretation of 42 U.S.C. § 1973c" is declaratory and injunctive relief). We decline to imply any action for damages.

IX

[24] There is also an issue of whether the organizations' complaint can be read fairly to include a request for damages based on constitutional claims or statutory claims such as section 1983, 42 U.S.C. § 1983. We agree with the district court, however, that the officials involved in this action would be entitled to immunity from such damage claims.

Under *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), state prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities. Federal prosecutors receive the same protection. *Butz v. Economou*, 438 U.S. 478, 516–17, 98 S.Ct. 2894, 2915–16, 57 L.Ed.2d 895 (1978). Other executive officials are entitled to qualified immunity, *see, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247–49, 94 S.Ct. 1683, 1691–92, 40 L.Ed.2d 90 (1974) (state executive officials), as are prosecutorial activities that are merely administrative or investigative. *Jacobson v. Rose*, 592 F.2d 515, 524 (9th Cir.1978), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979).

We have previously employed *Imbler*'s functional approach for determining the degree of immunity for prosecutorial activity. *See Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir. 1984). Quasi-judicial activities are not limited to post-indictment matters, but also include "[i]nvestigative functions carried out pursuant to the preparation of a prosecutor's case." *Freeman on Behalf of the Sanctuary v. Hittle*, 708 F.2d 442, 443 (9th Cir.1983) (per curiam). *See also Atkins v. Lanning*, 556 F.2d 485, 488–89 (10th Cir. 1977) (per curiam).

The district court held that the actions in question were investigatory rather than prosecutorial in nature. The limited investigative activities undertaken by Russoniello, however, may be encompassed within those activities essential to the initiation of a prosecution. His decision to request a sampling of voting records can hardly be

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described as a purely administrative act. The Third Circuit has highlighted this aspect of a prosecutor's duties:

> We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decision-making and the potential for needless actions. We believe the right to make the decision without being subject to suit must include some limited right to gather necessary information.

Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir.1979), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981).

We need not determine whether the district court erred in denying absolute immunity, because we agree that all those sued are entitled at least to qualified, good faith immunity. The controlling standard is "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Moreover, summary judgment is encouraged as an appropriate tool to "avoid excessive disruption of government." *Id.*

Under this objective standard, all the officials are entitled to immunity. The county officials did no more than submit information in the public record to the United States Attorney at his request, with some later, voluntary interviews of those voters whose citizenship the INS was unable to ascertain. Such actions do not violate any "clearly established" rights. Examining information in the public record violates no one's rights. The Northern District Director of the INS, David Ilchert, similarly did no more than provide information to Russoniello that was available to anyone on request.

Russoniello's actions were limited to conducting a preliminary investigation of potential voting fraud by examining and cross-checking public records. The limited scope of the investigation was reasonably related to his need to secure a preliminary indication of the scope of potential illegalities. No further activities were undertaken or contemplated. These actions also violated no individual's "clearly established" rights; indeed, it was Russoniello's duty to perform this investigation under the Voting Rights Act.

The organizations' claims rest entirely on their contention that an investigation using a language-based classification to define its scope is subject to strict scrutiny as invidious discrimination on the basis of national origin. This contention is further dependent upon a finding that the illegality of using such a classification was "clearly established." *See Capoeman v. Reed*, 754 F.2d 1512, 1514 (9th Cir.1985) (establishing framework for determining whether a right was clearly established for purposes of qualified immunity). We already have concluded that such a classification does not call for strict scrutiny. But even if it did, the illegality of such a classification was not "clearly established." The district court's order finding qualified immunity for all federal and state officials sued is therefore affirmed.

AFFIRMED.

NELSON, Circuit Judge, concurring and dissenting;

I agree that the controversy is not moot (section II), that the organizations have standing (section III), and that the defendants are entitled to good faith immunity from damages under 42 U.S.C. § 1983 (section IX). I dissent from the holdings that Olagues lacks standing (part of section III), that "extraordinary circumstances" are required to enjoin an investigation that infringes upon First Amendment rights (section IV), that heightened scrutiny is not warranted for the equal protection claim (section [redacted]), that declaratory and injunctive relief should be judged under the same

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standards (section VI), and that the plaintiffs have no claims under the Voting Rights Act (sections VII and VIII). I would remand on the injunction and one Voting Rights Act claim, and reverse the denial of a declaratory judgment which provides that the investigation violated the Equal Protection Clause. For clarity and brevity, I will limit my comments on this complex case to these issues.

Standing should not be denied to Olagues. Neither rationale employed by the majority is convincing. The prudential analysis speaks of "equitable relief" but then considers solely the request for an injunction, ignoring the declaratory relief sought. The majority concedes that Olagues has alleged an injury, but then categorizes the harm as "subjective" and therefore nonjusticiable under *Laird v.* [redacted], 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Yet *Laird* recognizes that when the complainant is subject to the challenged exercise of government power, whereby the government improperly imposed an affirmative obligation likely to have a deterrent effect on the exercise of his rights, *Lamont v. Postmaster General*, 381 U.S. 301, 308, 85 S.Ct. 1493, 1497, 14 L.Ed.2d 398 (1965), the requirements of standing are met. *Laird*, 408 U.S. at 11–13, 92 S.Ct. at 2324–25 (citing *Lamont*).

Olagues satisfies the requisites of standing under the very case upon which the majority relies. *See McMichael v. County of Napa*, 709 F.2d 1268, 1269–70 (9th Cir. 1983). The burden which Olagues alleges upon his exercise of the franchise—that his request for a bilingual ballot triggered an investigation of him by the INS, the FBI, and the United States Attorney, and an interview with the local District Attorney at which he was to prove his citizenship—is concrete. He has a personal stake in the controversy and the relief requested would prevent the injury from recurring. Moreover, the majority's suggestion that any stigma attributable to the government's action was Olagues' own fault, because all publicity concerning the investigation resulted from the filing of this lawsuit, has neither legal support nor a factual basis in the record.

The majority accords standing to the organizations because the investigation threatened their members. The identical threat is posed to the group of voters to which Olagues belongs—Hispanic citizens who request bilingual ballots. This language minority group is explicitly protected against voting discrimination. *See* 42 U.S.C. § 1973b(f)(2). The injury to Olagues as a member of this group is another ground for his standing under the Equal Protection Clause. *See United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 522 (2d Cir.1975).

The majority misstates the standard for injunctive relief in this context. Instead of the "extraordinary circumstances" threshold, drawn from federalism and criminal cases,[1] this investigation should have been enjoined if it lacked a reasonable basis or was initiated in bad faith. *See Branzburg v. Hayes*, 408 U.S. 665, 699–701, 707–08, 92 S.Ct. 2646, 2665–2666, 2669–2670, 33 L.Ed.2d 626 (1972); *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1064 (D.C.Cir.1978), *cert. denied*, 440 [redacted] 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *Pollard v.* [redacted] 283 F.Supp. 248, 256–58 (E.D.Ark.), *aff'd*, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (*per curiam*). The First Amendment protects citizens from investigations which do not meet this

1. See *Rizzo v. Goode*, 423 [redacted]S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976) (federalism issues in injunction of municipal police); *Jett* [redacted] *Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (no immediate controversy on discovery until prosecution had commenced); *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) (prosecutor's choice of evidence to present to grand jury), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) (United States Attorney arrested for contempt for refusing to sign a grand jury indictment), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala.1980) (prosecutorial vindictiveness); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D. Ill.1964) (motion to quash grand jury subpoenas).

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"reasonable basis" standard. *Pollard*, 283 F.Supp. at 258; *Reporters Committee*, 593 F.2d at 1064. *See also Branzburg v. Hayes*, 408 U.S. 665, 699–01, 707–08, 92 S.Ct. 2646, 2665–66, 2669–70, 33 L.Ed.2d 626 (1972).

The organizations alleged that the United States Attorney lacked a reasonable basis for initiating the investigations. The district court should have made a finding on this issue. *See La Rouche v. Webster*, 566 F.Supp. 415, 418 (S.D.N.Y.1983); *Pollard*, 283 F.Supp. at 258. The relief sought by the organizations was not anticipatory, since the investigation presented a current case or controversy. *Cf. Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (no case or controversy); *Reporters Committee*, 593 F.2d at 1065. The denial of the preliminary injunction should be affirmed, therefore, only if the organizations failed to show that the investigation was not reasonable or initiated in bad faith. The question should be remanded.

Contrary to the majority's view, declaratory relief raises different concerns than an injunction. To quote one case cited by the majority, "critical distinctions make declaratory relief appropriate where injunctive relief would not be." *Steffel v. Thompson*, 415 U.S. 452, 481, 94 S.Ct. 1209, 1226, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring). The majority echoes the mistake of the panel which was reversed in *Steffel* for holding that a failure to demonstrate irreparable injury precluded the granting of declaratory relief. *Id.* at 471–72, 94 S.Ct. at 1221–22. It reasons that where injunctive relief is inappropriate, declaratory relief should also be denied, because "an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation." This concern is misplaced, because an injunction *should* issue if the government so flouts a judgment declaring certain action unconstitutional. Declaratory relief is a separate remedy to be awarded when warranted, even if an injunction under the same circumstances would be denied. *Steffel*, 415 U.S. at 471–72, 94 S.Ct. at 1221–22.

This case warrants the award of a declaratory judgment under the Constitution. The investigation fails before the scrutiny required for a classification which burdens the voting rights of a suspect class.

The majority recognizes that the investigation targeted "recently registered, foreign-born voters who requested bilingual ballots," at ——, but then analyzes the class as if it were defined solely by language ability. The classification was of those who requested bilingual ballots, not just of individuals who speak more than one language, and it included two other factors—foreign birth and recent registration to vote. The class should be analyzed as defined by these *three* characteristics.

Foreign birth is "an immutable characteristic determined solely by an accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973), and is similar to a national origin classification. Together with the requirement of recent registration, the target class appears composed of immigrants who have recently obtained United States citizenship but prefer Spanish or Chinese-language ballots. Like the class of Hispanics in *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), these characteristics taken together define a suspect class. The investigation by the FBI and INS, together with the interviews requiring proof of citizenship, amount to "different treatment" of these citizens. Such additional requirements imposed on voters "solely because of their ancestry are by their very nature odious to a free people." *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

The fundamental right to vote was burdened by this investigation. The majority finds otherwise, perhaps because it equates "burden" with outright denial of the right

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to vote. Precedent does not define "burden" so narrowly, however. *See, e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663, 666–67, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966) (poll tax constitutes burden). Nor is "denial" of the right to vote the only behavior prohibited under the Voting Rights Act. *See* 42 U.S.C. § 1973 ("no voting qualification or prerequisite to voting, or standard, practice, or procedure ... to deny or abridge ..."); 42 U.S.C. § 1973i(b) ("intimidate, threaten, or coerce").

The opinion states that "it is difficult to see how any 'burden' was placed," but I do not share this difficulty. An investigation by the FBI and INS and a summons to the district attorney to prove one's citizenship, as I noted above concerning the injury to Olagues, constitutes a burden on the exercise of the right to vote *in this case*. The impact of the investigation on the class went beyond any ordinary inconvenience caused to witnesses. These individuals are not fluent in English, are new to this country, and through their recent acquisition of citizenship have experienced the INS bureaucracy, which misrepresented the citizenship status of more than half of those investigated. When a citizen's request for a bilingual ballot—which is specifically made available by Congress to eliminate voting discrimination against those more comfortable in another language, *Chinese for Affirmative Action v. Lequennec*, 580 F.2d 1006, 1008 (9th Cir.1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979)—triggers such consequences, a burden has been imposed. The Voting Rights Act forbids intimidation of voters, and in my view this investigation intimidated those foreign-born, recently registered voters who requested bilingual ballots.

Having examined the character of the classification in question and the importance of the individual interests at stake, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979), we examine the interests asserted in support of the classification. *Id.* The classification must be necessary to serve a compelling interest, and it must employ the least drastic means to achieve that end. *Id.* at 184–85, 99 S.Ct. at 990. This investigation cannot withstand such scrutiny. It was not narrowly tailored to catch those wrongly registered, because it targeted recently registered citizens, who are required by law to be literate in English. It assumed that individuals who speak Spanish or Chinese are likely not to be citizens, though the statistical predominance of Spanish—and Chinese-speaking citizens is the very reason why provision of bilingual ballots was required under federal law. The investigation was unconstitutional under the Equal Protection Clause, and a declaratory judgment should be granted.

Relief may also be required under the Voting Rights Act. I would remand the issue of potential violation of 42 U.S.C. § 1973aa–1a. *See Lequennec*, 580 F.2d at 1008–09. Good faith is not a defense under this provision, which does not require intent to discriminate. *Id.*

Finally, even absent its legal infirmities, this investigation violated the spirit behind the Voting Rights Act, which charges the Attorney General with eradicating discrimination against language minority voters and discrimination based upon national origin. Instead, this U.S. Attorney's efforts *engendered* such discrimination. I cannot join the majority's wholesale affirmance of the district court's judgment.

WEST KEY NUMBER SYSTEM

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R.B., 429 F.2d 697 (10th Cir.1970), and more recently by the Fourth Circuit, *Air Transit v. N.L.R.B.*, 679 F.2d 1101 (4th Cir.1982), the Board sought to impose the same infestation on the Eleventh Circuit. The effort is to no avail.

[24] We hold that the daily lessees are independent contractors and not employees of the Company and the contrary finding of the Board is unsupported by substantial evidence. *N.L.R.B. v. Deaton, Inc.*, 502 F.2d at 1223. The record does not support "two fairly conflicting views," *N.L.R.B. v. United Insurance Co.*, 390 U.S. at 260, 88 S.Ct. at 992, but only one: the daily lessees are independent contractors. *A fortiori* the annual lessees, over whom the Company concededly exercises even less control and who have a greater investment and entrepreneurial interest in the taxicabs than the daily lessees also are independent contractors.[4] Accordingly, the enforcement of the order of the Board is DENIED.

KEY NUMBER SYSTEM

PENTHOUSE INTERNATIONAL, LTD., Plaintiff-Appellee,

v.

Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

No. 81-7426.

United States Court of Appeals, Eleventh Circuit.

April 11, 1983.

Opinion on Granting of Rehearing En Banc June 30, 1983.

Owner of rights to film brought suit to enjoin county prosecutor in Georgia from prosecuting or threatening to prosecute, under Georgia obscenity statute, any person exhibiting the film. The United States District Court for the Northern District of Georgia at Atlanta, Richard C. Freeman, J., denied permanent injunction but granted declaratory relief in favor of the plaintiff. On appeal by the county prosecutor, the Court of Appeals, Tjoflat, Circuit Judge, held that: (1) injunctive relief was properly denied where reasonable prosecutor could believe there was probable cause that those who would be involved in exhibition of the film would violate the Georgia obscenity statute as constitutionally applied, but (2) district court erred in proceeding to determination of the obscenity vel non of the film where such issue could not be resolved as matter of federal constitutional law.

Affirmed in part; reversed in part and remanded.

Lynne, District Judge, sitting by designation, dissented and filed opinion.

1. Injunction ⇐105(1)

Where prosecutor threatened to enforce valid criminal statute against behavior that fell within ambit of statute, in that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, such prosecutorial threat under such circumstances gave rise to no cause of action for injunction. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐90.1(8)

Obscenity is not protected under the First Amendment, and states are free to enact statutes making exhibition of obscene matter criminal. O.C.G.A. § 16-12-80; U.S.C.A. Const.Amend. 1.

3. Criminal Law ⇐31

It is fundamental that some innocent persons may be charged with violating

4. Having reached this result it is unnecessary for us to reach the issue of whether the annual lessees are supervisors because, as independent contractors, they do not qualify as employees and therefore, supervisors or not, would not properly be included in a bargaining unit. 29 U.S.C. § 152(3).

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criminal statutes, and, absent prosecutorial misconduct, no constitutional claim exists to relieve burden on those innocent persons of defending valid criminal prosecutions.

4. District and Prosecuting Attorneys ⇐8

Prosecutor was well within his discretion in threatening to prosecute persons associated with showing of film, in that reasonable prosecutor could have believed there was probable cause that those involved in exhibition of such film would be violating Georgia obscenity statute as constitutionally applied. O.C.G.A. § 16–12–80; U.S.C.A. Const.Amend. 1.

5. Courts ⇐508(7)

Though county prosecutor threatened to enforce valid criminal statute against behavior falling within ambit of statute, in sense that reasonable prosecutor could have believed there was probable cause that those who would be involved in exhibition of film would violate Georgia obscenity statute as constitutionally applied, owner of rights to film was not entitled to ruling from federal district court that film was not obscene unless it was proved that film was not obscene as matter of federal constitutional law regardless of factual context in which movie was shown. O.C.G.A. §§ 16–12–80, 16–12–80(b); U.S.C.A. Const.Amend. 1.

George Weaver, Atlanta, Ga., for defendant-appellant.

Grutman, Schafrann & Miller, Norman Roy Grutman, New York City, Gambrell & Mobley, James L. Paul, Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and HENDERSON, Circuit Judges, and LYNNE*, District Judge.

TJOFLAT, Circuit Judge:

Penthouse brought this suit to enjoin the Solicitor General of Fulton County, Georgia, Hinson McAuliffe, from prosecuting or threatening to prosecute under the Georgia obscenity statute, Ga.Code § 16–12–80 (1980), any person who exhibited the movie "Caligula," the rights to which Penthouse owns.[1] Penthouse also sought a declaration that "Caligula" is not obscene within the meaning of that obscenity statute as constitutionally applied.[2] After a trial before the district court and an advisory jury, the court declared "Caligula" not obscene under state or federal law. The court denied Penthouse's prayer for a permanent injunction because it assumed that a declaratory judgment would have the same practical effect as an injunction of restraining prosecution or threats thereof. McAuliffe appeals from the district court's entry of declaratory relief in favor of Penthouse.

We affirm the district court's denial of the injunction, although our reasoning differs from that of the district court.[3] We

* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

1. Jurisdiction was predicated on 28 U.S.C. § 1343(3) (1976 & Supp. IV 1980), through which 42 U.S.C. § 1983 (1976) is implemented.

2. Penthouse makes no attack on the facial validity of the Georgia obscenity statute. Indeed, such an attack would be frivolous because that statute explicitly incorporates the constitutional standards enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Ga.Code § 16–12–80 (1980).

3. We recognize that Penthouse never cross-appealed the district court's denial of injunctive relief. Therefore, we discuss such denial at the risk of pontificating obiter dictum. We believe our discussion is necessary, however, for two reasons. First, our discussion of the district court's grant of declaratory relief would not be complete without a discussion of its denial of injunctive relief. Although the two prayers for relief are separate, they are closely related. A typical complaint, such as the one Penthouse brings, would contain both prayers. Neither should be considered in a vacuum; profitable comparison results from a discussion of both. Second, the district court denied injunctive relief solely because it thought declaratory relief would be sufficient. We now reverse the district court's grant of declaratory relief. Our reasons for agreeing with the district court that it should not have granted injunctive relief are

reverse the district court's grant of Penthouse's prayer for declaratory relief and remand this claim because the court erred in proceeding to a determination of the obscenity vel non of "Caligula."

The essence of Penthouse's complaint is that McAuliffe is infringing on Penthouse's first amendment rights by threatening to prosecute persons involved in the showing of "Caligula."[4] Penthouse alleges that it cannot obtain an exhibitor in Fulton County because of McAuliffe's threats of prosecution.[5] To remedy this infringement, Penthouse seeks two remedies: an injunction against prosecution or threats thereof, and a declaration that "Caligula" is not obscene. Careful analysis reveals that these two remedies are in fact based on separate causes of action.

[1] The focus of Penthouse's suit for an injunction is on McAuliffe's conduct. McAuliffe threatened to enforce a valid criminal statute against behavior that falls within the ambit of the statute, in the sense that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" would violate the Georgia obscenity statute as constitutionally applied. Prosecutorial threats in such circumstances give rise to no cause of action for an injunction.[6] To sustain a cause of action for an injunction, Penthouse would have to show some sort of "bad-faith" conduct on McAuliffe's part. We do not mean subjective bad-faith conduct; rather, if Penthouse could show that no probable cause reasonably could have existed to [redacted] that those who would be involved in the exhibition of

so different from that of the lower court that we believe we are compelled to state them.

4. Penthouse's complaint describes the threats as follows:

Defendant McAuliffe's Conduct

16.

Defendant McAuliffe has publicly announced that he considers *Caligula* to be obscene by commencing a lawsuit in United States District Court for the Southern District of New York in the name and style: *Morality In Media, Inc., individually; and Morton A. Hill, S.J., for himself and all others similiarly [sic] situated; and Hinson McAuliffe, in his official capacity as Solicitor General of Fulton County, Georgia, himself and all others similiarly [sic] situated v. One Motion Picture Film Entitled "Caligula," a res; Edward R. Korman, in his official capacity as United States Attorney for the Eastern District of New York; and Benjamin R. Civiletti, in his official capacity as Attorney General of the United States*, Civil Action No. 80–0640 (hereinafter the "Southern District of New York Lawsuit"). Defendant McAuliffe, allegedly in his capacity as Solicitor General of Fulton County, Georgia, and as part of the Southern District of New York Lawsuit, caused to be issued by the Clerk of said court, a warrant for the seizure of *Caligula*.

17.

In the Southern District of New York Lawsuit initiated by Defendant McAuliffe and others, Defendant McAuliffe alleged under oath that *Caligula* is obscene; and Defendant McAuliffe alleged that if *Caligula* is exhibited in Fulton County, Georgia, Defendant McAuliffe will commit public funds and resources to institute prosecutions under Georgia law.

Record, vol. 1, at 8–9. Penthouse's complaint also alleges that the plaintiffs in the Southern District of New York lawsuit, including McAuliffe, sought to compel the defendants therein to initiate some type of action to prevent the exhibition or distribution of "Caligula" in the United States. *Id.* at 9.

5. We have no reason to question the district court's findings that McAuliffe has threatened to prosecute and that Penthouse cannot obtain an exhibitor in Fulton County.

6. Indeed, the Supreme Court has, in dicta, addressed a similar, if not identical, situation. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). After holding an act creating a censorship commission unconstitutional, the Court stated:

> [W]e do not mean to suggest that private consultation between law enforcement officers and distributors prior to the institution of a judicial proceeding can never be constitutionally permissible. We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating [redacted] laws prohibiting obscenity. Where such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Id. at 71–72, 83 S.Ct. at 640. Thus, the Supreme Court has at least intimated that there may be no constitutional problem arising from threats of enforcement of a valid obscenity statute against conduct that falls within the reach of the statute.

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"Caligula" would be violating the Georgia obscenity statute as constitutionally applied, because "Caligula" is so clearly not obscene, the requisite objective bad faith would be shown.

[2, 3] We base this reasoning on several premises. Our initial and most basic premise is that obscenity is not p[redacted] under the first amendment. *See* [redacted] *California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Thus, states such as Georgia are free to enact statutes making the exhibition of obscene matter criminal. *See* Ga.Code § 16–12–80 (1980). Our second premise is that states may enforce their valid criminal statutes within constitutional limits. They may also charge certain public officials, such as McAuliffe, with the responsibility of enforcing such laws. Our third premise is that it is fundamental that some innocent persons may be charged with violating criminal statutes, and that absent prosecutorial misconduct, no constitutional claim exists to [redacted] the burden on those innocent persons of defending valid criminal prosecutions. We believe the validity of these three premises is beyond question. We believe also that these premises lead inescapably to the conclusion that law enforcement officials must be allowed the discretion in good faith to do all that is reasonably necessary to their function of enforcing valid laws, and that the first amendment contemplates no other result.

[4] We hold that McAuliffe was well within his discretion in threatening to prosecute persons associated with the showing of "Caligula." Having viewed "Caligula," it is clear to us that a reasonable prosecutor could have believed there was probable cause that those who would be involved in the exhibition of "Caligula" in Fulton County, Georgia, would be violating the Georgia obscenity statute as constitutionally applied. Regardless of the obscenity vel non of the movie, it cannot be contended that the movie is so clearly not obscene that McAuliffe was acting in "bad faith" in threatening to prosecute. Without such a showing, we hold a claim for an injunction under the first amendment is not stated. Therefore, we affirm the district court's denial of Penthouse's prayer for injunctive relief.

[5] Penthouse's second claim seeks a declaratory judgment that "Caligula" is not obscene under the Georgia obscenity statute as constitutionally applied. We hold that Penthouse is entitled to this relief only if it can prove that "Caligula" is not obscene as a matter of federal constitutional law. If factual issues are present, Penthouse's claim must be denied because the claim would be nothing more than a request that a federal court determine whether prospective, possibly illegal conduct is in fact illegal under a valid state criminal statute. To allow such a claim would be to countenance the bypass of the entire state criminal justice system so a federal court could determine the "guilt or innocence," under a valid state criminal statute, of one who proposes to exhibit "Caligula." Notions of comity and federalism preclude us from recognizing such a cause of action, especially in an area in which local community standards are so crucial. *See Miller* [redacted] *California*, 413 U.S. 15, 30–34, 96 S.Ct. 2607, 2618–20, 37 L.Ed.2d 419 (1973). In contrast, if Penthouse can prove that "Caligula" is not obscene as a matter of federal constitutional law, notions of comity and federalism would not interfere with a federal court's grant of declaratory relief. In granting relief, the federal court would not be invading the province of the state factfinder; rather, it would be determining a question of federal constitutional law as a matter of law.

Furthermore, if Penthouse cannot prove that "Caligula" is not obscene as a matter of law, its claim must fail because it would not prove a present case or controversy. The allegedly protected conduct would be the prospective exhibition of a movie under hypothetical conditions. However, by addressing the claim only as a matter of [redacted], no problem of the requisite case or controversy would exist because the complaint would be that the facts involving the exhibition of the film, *e.g.*, where and when the movie is shown, are irrelevant. The com-

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plaint would be that regardless of the factual context in which the movie is shown, the movie is not obscene as a matter of law. Thus, there is nothing to prevent a federal court from recognizing such a cause of action.

We believe the above analysis is consistent with and supported by a case somewhat analagous to this one, *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). In *Steffel* the Supreme Court held that a valid claim for declaratory relief was stated when the complaint alleged threats of prosecution under a facially valid criminal trespass statute against conduct arguably protected under the first amendment. A cognizable claim was stated because a federal court could determine as a matter of law whether such threats violated the plaintiff's constitutional rights. No factual issues needed resolution; a pure question of law was presented. Because such a question was presented, no prohibitive problems of federalism or case or controversy arose.

Steffel would have been a much different case had it been disputed whether the plaintiffs would make a "knowing" entry upon the defendant's land within the meaning of the state trespass statute. Problems of federalism and case or controversy would have then arisen. The same problems arose in this case when the district court determined the obscenity vel non of "Caligula." The court had to determine the following hypothetical factual issues under the Georgia obscenity statute: whether the future showing of "Caligula" would predominantly appeal to the prurient interest of the local community; whether the showing would be patently offensive to that community; and whether the showing would have serious literary, artistic, political, or scientific value. *See* Ga.Code § 16–12–80(b) (1980). Only if these questions can be resolved as a matter of federal constitutional law[7] does this case parallel *Steffel*. If not, the district court must not attempt to resolve these questions because they are more appropriately left to state factfinders and because they involve hypothetical circumstances.[8]

AFFIRMED in part; REVERSED in part and REMANDED.

LYNNE, District Judge, dissenting:

In my opinion the discussion and affirmance of the district court's denial of an injunction are inappropriate. Penthouse did not contest that ruling by a cross-appeal. The superficial parallelism of the remedies of injunctive and declaratory relief would not seem to justify consideration of standards applicable to the former to illuminate the only issue before us, the grant of the latter.

I believe the court's opinion is contrary to the precise holding of *Steffel:*

> We therefore hold that, regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute, whether an attack is made on the constitutionality of the statute on its face or as applied. 415 U.S. 452, 475, 94 S.Ct. 1299, 1223–24, 39 L.Ed.2d 505 (1973).

7. Because these questions must be resolved as a matter of law, a jury has no role in these determinations.

8. We hold only that the district court cannot decide the question of the obscenity of "Caligula" as a matter of state law. We remand the case for the court to decide the question as a matter of federal constitutional law, just as a federal appellate court would if it was reviewing a state jury determination. *See Jenkins v. Georgia*, 418 U.S. 153, 161, 94 S.Ct. 2750, 2755, 41 L.Ed.2d 642 (1974) ("We hold that the film could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendments because it is obscene."). Thus, the dissent mischaracterizes our holding as one of abstention. We are not refusing to intervene to protect federal rights; we are refusing only to decide state law questions. We see no prohibition on deciding whether "Caligula" is protected as a matter of federal constitutional law without deciding any state law questions. The dissent also fails to recognize the separate nature of the state and federal questions. For example, the Georgia obscenity statute must give at least as much protection to "Caligula" as does the first amendment, but the statute may extend greater protection consistent with federal law. Furthermore, state law may vary depending on who applies it, i.e., a federal judge or a state jury. The state should be free to interpret its own law so long as that interpretation is consistent with federal constitutional law.

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It is conceded that Penthouse demonstrated a genuine threat of enforcement of the Georgia statute. Clearly there is a dispute as to whether this statute may be applied to "Caligula." McAuliffe believes "Caligula" is obscene; Penthouse does not. Thus there is a case or controversy within the meaning of Article III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201. *Septum, Inc. v. Keller,* 614 F.2d 456 (5th Cir.1980).

Synthesizing the averments of the complaint, the consolidated pre-trial order, the trial transcript, and the May 15, 1981 order of the court, it is at once apparent that the gravamen of the claim asserted by Penthouse is that "Caligula" is protected by the First Amendment as applied to the States through the Fourteenth Amendment. Concededly obscene material is not protected. *Miller* established a three-prong conterminous test to determine obscenity vel non which Georgia incorporated in its statute.

If "the average person, applying contemporary community standards would [not] find that ["Caligula"], taken as a whole, appeals to the prurient interest," the First Amendment insulates it from the application of the Georgia statute. Appeal to the prurient interest is a question of fact. *Smith v. United States,* 431 U.S. 291, 301, 97 S.Ct. 1756, 1763–64, 52 L.Ed.2d 324 (1977).

It would be anomalous to suggest that it is possible to adjudicate the question of whether material is obscene under the Georgia statute without resolving at the same time whether such material is protected by the First Amendment within the *Miller* definition of obscenity since out of the facts the law arises. Both the advisory jury and the court found as a fact that, applying contemporary community standards, Caligula does not appeal to the prurient interest.

A careful review of the Court's instructions to the jury reveals that its definition of the prurient interest was in accord with the teaching of *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). The Court properly charged the jury that the burden of proof with respect to obscenity was proof beyond a reasonable doubt. *McKinney v. Alabama,* 424 U.S. 669, 684, 96 S.Ct. 1189, 1197, 47 L.Ed.2d 387 (1976) (Brennan, J., concurring in the judgment). It is reasonable to assume that the trial judge applied these standards in his own fact findings.

Finally, I cannot agree with the implication of the Court's opinion that the district court was powerless to resolve the question of whether Caligula is obscene under the Georgia statute in order to reach the question as to whether it is protected by the First Amendment; that it is "more appropriately left to state factfinders."

Septum, Inc. squarely holds that under the circumstances of this case abstention is inappropriate. Presumably state factfinders would be confined to a criminal proceeding. The fallacy of this approach is demonstrated by the reasoning of *Steffel:*

> [W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of the federal courts to intervene when no state prosecution is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462, 94 S.Ct. at 1217.

I respectfully dissent.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, and RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the case shall be reheard by this Court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

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these cases from a case of smuggling in Walden [redacted] United States, 5th Cir. 1969, 417 F.2d 698. We repeat that distinction here. *Leary, Marchetti* and *Grosso* held invalid under the fifth amendment statutes which required an individual to pay federal taxes on activities that the State had declared illegal, and which therefore would subject the individuals to prosecution under state laws. In the present case, however, if the appellants had declared and invoiced the heroin and marihuana at the International border, they would not, at that point, have been vulnerable to prosecution, either Federal or State, because they would have complied with the Federal law and would never have reached the United States with the drugs in their possession. *See* Rule [redacted] United States, 5th Cir. 1966, 362 F.2d 215.

[3] Secondly, appellants urge that they could not have *unlawfully* transported and concealed the marihuana and heroin beyond the primary border checkpoint because they only proceeded beyond that point, where they had failed to declare the contraband, to the secondary checkpoint at the direction of the customs authorities. This point, too, is controlled by our decision in Walden [redacted] United States, *supra*, where we held that when a defendant enters custom's primary inspection station and fails to declare and invoice marihuana at the first opportunity, he is in violation of the law.

[4] Finally, it is argued that the district court should have permitted the jury to pass on appellants' assertions that they are sincere followers of the Moslem or Islamic religion, which sanctions the use of heroin and marihuana. Appellants claim that failure to admit this evidence violates their first amendment right to freedom of religion. We disposed of this question in Leary [redacted] United States, 5th Cir. 1967, 383 F.2d 851, 859–862, reversed on other grounds, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969), where we cited numerous authorities in support of the proposition that the use of drugs as part of religious practice is not constitutionally privileged.

We find no reversible error and the judgment is affirmed.

Charles MAJURI and Joseph Caruano
[redacted]
UNITED STATES of America, John N. Mitchell, Attorney General of the U. S., Frederick B. Lacey, United States Att'y for the District of New Jersey, and John Doe, any Federal Law Enforcement Officer

Joseph Caruano, Appellant in No. 18903
Charles Majuri, Appellant in No. 18904.
Nos. 18903, 18904.

United States Court of Appeals,
Third Circuit.

Argued June 23, 1970.

Decided Aug. 17, 1970.
Certiorari Denied Dec. 7, 1970.
See 91 S.Ct. 245.

Action for preliminary and permanent injunction restraining the United States, the Attorney General and other federal law enforcement officers from proceeding with prosecutions against plaintiffs based on federal statutes prohibiting use of extortionate means to collect or to attempt to collect extensions of credit. The United States District Court for the District of New Jersey, Leonard I. Garth, J., dismissed motions for convening of three-judge district court and for preliminary injunction and dismissed the complaint. The plaintiffs appealed. The Court of Appeals, Gibbons, Circuit Judge, held that where only allegation advanced by plaintiffs in support of injunction against pending federal criminal prosecution for using extortionate means to collect or attempting to collect extensions of credit was inconvenience of the trial and preference for civil remedy before three-judge dis-

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trict court instead of single-judge court, complaint failed to state claim for injunctive relief and did not warrant convening of three-judge court.

Affirmed.

1. Courts ⇐385(1)

Where district court enters appealable order, review of its refusal to convene a three-judge district court lies in the Court of Appeals. 28 U.S.C.A. § 2284.

2. Courts ⇐101

In determining substantiality of claimed constitutional question upon which request for three-judge district court is based, the district court makes a judicial decision and district court must look beyond prayer for relief to the substantive allegations of the complaint. 28 U.S.C.A. § 2284.

3. Injunction ⇐105(1)

While activities protected by First Amendment are common bases for injunctive relief against actual or threatened criminal prosecution, they are not the only activities worthy of such protection in appropriate circumstances and are not the sine qua non for injunctions against criminal prosecutions. U.S.C.A. Const. Amend. 1; 28 U.S.C.A. §§ 2281, 2282, 2284.

4. Courts ⇐101

Where only allegation advanced by plaintiffs in support of injunction against pending federal criminal prosecution for using extortionate means to collect or attempting to collect extensions of credit was inconvenience of the trial and preference for civil remedy before three-judge district court instead of single-judge court, complaint failed to state claim for injunctive relief and did not warrant convening of three-judge court. 18 U.S.C.A. §§ 891, 892, 894; 28 U.S.C.A. §§ 2282, 2284.

5. Courts ⇐101

District court should judiciously and cautiously screen applications for three-judge panels. U.S.C.A.Const. Amend. 1; 28 U.S.C.A. §§ 2281, 2282, 2284.

6. Courts ⇐101

Single-judge district court may adjudicate claim for declaratory relief if the court has subject matter jurisdiction. 28 U.S.C.A. §§ 2201, 2202.

7. Courts ⇐101

Where single-judge district court's jurisdiction of remaining claim for declaratory relief after denial of application for convening of three-judge district court was based on statute granting district court original jurisdiction of all civil actions wherein matter in controversy exceeds the sum of $10,000 and arises under Constitution, laws, or treaties of the United States, but complaint did not allege the requisite jurisdictional amount, single-judge court properly dismissed plaintiff's claim for declaration that Congress was without power to prohibit intrastate loan sharking. 18 U.S.C.A. §§ 891, 892, 894; 28 U.S.C.A. §§ 1331, 2201, 2202.

Filindo B. Masino, Berk, Masino & Moonblatt, Philadelphia, Pa., for appellants.

Frederick P. Hafetz, Justice Dept., Newark, N. J., for appellees.

Before WINTER,* ALDISERT and GIBBONS, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

On December 16, 1969 a Federal Grand Jury sitting at Newark, New Jersey, handed up a seven count indictment (Crim. No. 545-69) against appellants, Majuri and Caruano, along with others not parties to this action. Three counts of that indictment charged appellants with conspiracy to make, the making of, and the collection of extortionate extension of credit, in violation of 18 U.S.C. §§ 891, 892, and 894 (Supp. [redacted], 1970). That criminal case was routinely assigned to the Honorable Leonard I.

* Circuit Judge of the Court of Appeals for the Fourth Circuit, sitting by designation.

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Garth for pretrial motions, and he directed a time schedule for the orderly filing, briefing and argument of such motions. In the criminal case the defendants have filed a motion to dismiss so much of the indictment as charges them with violations of 18 U.S.C. §§ 891, 892, and 894, on the ground that those sections of Title 18 were enacted by Congress without constitutional authority and in violation of the Ninth and Tenth Amendments to the United States Constitution. Their contention is that Congress is without power to prohibit intrastate loansharking.

Appellants' motion to dismiss the loansharking counts of the indictment is still pending and undecided in the district court, solely because of the pendency of the civil action in which this appeal arises. On March 30, 1970, appellants filed a complaint alleging the fact of indictment Crim. No. 545–69, and:

> 4. Plaintiffs alleged that Sections 891, 892, and 894 of Title 18, United States Code, are repugnant to the 9th and 10th Amendments to the United States Constitution, in that they are vague, speculative, and do not charge an offense cognizable under the United States Constitution.
>
> 5. Plaintiffs allege that unless the defendants are restrained from enforcement of these provisions, the plaintiffs will suffer severe and irreparable harm, as more fully set forth in the affidavits attached hereto.

Appendix at 19.

In the affidavits referred to, Majuri and Caruano allege their indictment, that they have been arrested, and that they are free on substantial bail awaiting trial. They also allege:

> 3. As a consequence of the same, they have already expended, and will be in the future obliged to expend, great sums of money, as well as to undergo grave personal inconvenience and anxiety in the preparation of a defense to these charges.
>
> 4. Unless the Defendants are enjoined and restricted from committing the threatened acts, the Plaintiffs will suffer great and irreparable damage in that they believe, upon the advice of counsel, that Sections 891, 892 and 894 of Title 18, U.S.C. are unconstitutional and repugnant to the 9th and 10th Amendments to the United States Constitution * * *.

Appendix at 24–25.

Defendants in this civil action are described in the complaint as "the sovereign, and Law Enforcement Officials charged with the Prosecution of these matters." The prayer for relief seeks a preliminary and a permanent injunction restraining the defendants from proceeding with "any prosecution based on the provisions of Sections 891, 892, and 894 * * *."

With the complaint and affidavits, appellants filed a motion pursuant to 28 U.S.C. § 2284 (1964) for the convening of a three-judge district court and a motion for a preliminary injunction. The civil action was also assigned to Judge Garth. Both motions were heard by him on April 13, 1970. No answering pleadings were filed but the United States Attorney appeared and filed an extensive memorandum raising legal issues as to the sufficiency of the complaint in several particulars.

The government contended (1) that the claim of unconstitutionality is so insubstantial as to be frivolous, and (2) that the complaint and affidavits show no basis for equitable relief. On May 7, 1970 the district court filed a memorandum and order disposing of these contentions. Recognizing that those courts which had considered the constitutionality of the subject statutes had uniformly upheld them,[1] it found, neverthe-

1. United States v. Perez, 426 F.2d 1073 (2 Cir., May 1, 1970); United States v. Biancofiori, 429 F.2d 584 (7 Cir. 1970); United States [redacted] Curcio, 310 F.Supp. 351 (D.Conn.1970); United States [redacted] Calegro De Lutro, 309 F.Supp. 462 (S.D.N.Y. 1970).

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less, that the constitutional issue was at least sufficiently substantial to be beyond the province of a single judge. On the second issue, however, it held that the complaint failed to allege facts sufficient to invoke traditional equitable jurisdiction. Therefore, it denied injunctive relief, denied appellants' motion to convene a three-judge court, and dismissed the complaint.

Appellants filed notices of appeal and on May 19, 1970, applied to a panel of this court for injunctive relief pending appeal and for a stay of the judgment of the district court. The panel ordered an accelerated briefing schedule and referred those motions to the panel which would hear argument on the merits.

[1] Although it was not always so,[2] it is now clear that, at least in cases where, as here, the district court enters an appealable order, review of a refusal to convene a three-judge court lies in this court. Gunn v. University Committee, 399 U.S. 383, 90 S.Ct. 2013, 26 L.Ed.2d 684 (1970); Mengelkoch v. Industrial Welfare Commission, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2d 215 (1968); Wilson v. City of Port Lavaca, 391 U.S. 352, 88 S.Ct. 1509, 20 L.Ed.2d 636 (1968); Schackman v. Arnebergh, 387 U.S. 427, 87 S.Ct. 1622, 18 L.Ed.2d 865 (1967); Buchanan v. Rhodes, 385 U.S. 3, 87 S.Ct. 33, 17 L.Ed.2d 3 (1966); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962). Since in this case we affirm that refusal, we need not now decide whether or not there is jurisdiction in the court of appeals to grant preliminary injunctive relief pending appeal, or equivalent preliminary relief within the federal judicial system by way of mandamus pending appeal, or mandamus relief in the absence of an appealable order.[3]

2. Stratton v. St. Louis S. W. Ry., 282 U.S. 10, 51 S.Ct. 8, 75 L.Ed. 135 (1930), Ex parte Metropolitan Water Co., 220 U.S. 539, 31 S.Ct. 600, 55 L.Ed. 575 (1911); Miller v. Smith, 296 F.Supp. 927 (E.D. Pa.1965).

Appellants contend that having found the federal constitutional question to be at least not frivolous, the district court should have made no further inquiry, but should thereupon have entertained the request for a three judge court as a matter of form. Principal reliance for this position is upon the language of Idlewild Bon Voyage Liquor Corp. v. Epstein, *supra* 370 U.S. at 715, 82 S.Ct. at 1296:

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint *at least formally* alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. (Italics added)

Appellants emphasize that their prayer for relief asks for an injunction, that the complaint contains the words "irreparable injury" and that this is all the Supreme Court intended to require by the language "at least formally alleges a basis for equitable relief."

[2] We do not agree. It is clear that in determining the substantiality of the claimed constitutional question the district court makes a judicial decision. Schneider v. Rusk, 372 U.S. 224, 83 S.Ct. 621, 9 L.Ed.2d 695 (1963); Ex parte Poresky, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933); Fiumara v. Texaco, Inc., 240 F.Supp. 325, 326 (E.D.Pa. 1965); [redacted] v. Smith, *supra* note 2. Its function is analagous to that of a court reviewing a complaint for legal sufficiency under Rules 12(b)(1) or 12(b)(6) of the Fed.R.Civ.P. Hargrave v. McKinney, 413 F.2d 320, 324 (5 Cir. 1969). We cannot attribute to the

3. See Gunn v. University Committee, *supra*; Jackson v. Choate, 404 F.2d 910, 912 (5 Cir. 1968); Lyons v. Davoren, 402 F.2d 890, 892 (1 Cir. 1968), cert. denied, 393 U.S. 1081, 89 S.Ct. 861, 21 L.Ed.2d 774 (1969); Sinatra v. New Jersey State Commission, 311 F.Supp. 678 (D.N.J. 1970).

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Supreme Court the intention, in the same sentence of Idlewild Bon Voyage Liquor Corp. v. Epstein, *supra* 370 U.S. at 715, 82 S.Ct. at 1294, to distinguish between the district court's role in determining substantiality of a constitutional question and its role in determining the existence of a ground for equitable relief. Both decisions are judicial rather than ministerial. Both require that the district court look beyond the prayer for relief to the substantive allegations of the complaint.

Appellants suggest, however, that the decision as to substantiality of the federal constitutional question is "jurisdictional", at least in non-diversity cases, whereas a decision that the complaint fails to state a claim for equitable relief is a decision "on the merits" and hence one which by virtue of 28 U.S.C. § 2284 a single judge may not make. But it seems to us that a decision that a claimed question of constitutional law is insubstantial is even more clearly on the merits, and such decision is now a firmly established duty of a single district court judge. A finding of insubstantiality of the constitutional question is, moreover, one involving a more sophisticated judgment than that required to determine whether or not a complaint states a cause of action for injunctive relief. Over recent history far greater growth and change has taken place, and undoubtedly will continue to take place, in federal constitutional law than in the law of equitable remedies.

We agree, therefore, that it was the district court judge's duty to examine the complaint for substantive allegations which would support a claim for injunctive relief, and not to look merely at the prayer for relief and the conclusive allegation of irreparable injury.

Appellants are not faced with the choice of committing a violation of the criminal statute in order to test their constitutional contentions. There is no allegation that the pendency of the criminal charge inhibits them from engaging in protected activities. They do not allege that they should be free to continue intrastate loansharking. They say, only, that it is inconvenient and expensive to raise their constitutional contentions by appropriate pretrial and trial motions in the criminal case, though they have in fact done so. They do not even explain how it will be any less expensive to try the constitutional issues in this civil case than in the criminal case.

[3] The district court, referring to Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), and Reed Enterprises v. Corcoran, 122 U.S. App.D.C. 387, 354 F.2d 519 (1965), stressed in its memorandum the absence of any alleged infringement of first amendment rights. While activities protected by the first amendment are a common basis for injunctive relief against actual or threatened criminal prosecution, they are not the only activities worthy of such protection in appropriate circumstances. See, e.g., Hynes v. Grimes Packing Co., 337 U.S. 86, 98, 69 S.Ct. 968, 93 L.Ed. 1231 (1949); Cline v. Frink Dairy Co., 274 U.S. 445, 451, 47 S.Ct. 681, 71 L.Ed. 1146 (1927); Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Hygrade Provision Co. v. Sherman, 266 U.S. 497, 500, 45 S.Ct. 141, 69 L.Ed 402 (1925); Terrace v. Thompson, 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255 (1923); Truax v. Raich, 239 U.S. 33, 37, 36 S.Ct. 7, 60 L.Ed. 131 (1915). We do not, by affirming, therefore, suggest agreement with a possible interpretation of the district court opinion, that first amendment rights are a *sine qua non* for injunctions against criminal prosecutions.

[4] But, where, as here, the only allegation advanced in support of an injunction against a pending federal criminal prosecution is the inconvenience of that trial and the preference for a civil remedy before three judges instead of one, the complaint fails to state a claim for injunctive relief, and does not fall within the province of 28 U.S.C. §§ 2282 and 2284.

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[5] What is here approved is a judicious screening by the district courts of applications for three-judge panels. That screening should be done cautiously, of course, because of the procedural and jurisdictional morass into which litigants may be led by these troublesome three-judge court statutes. 28 U.S.C. §§ 2281, 2282, and 2284. But the role of the single district judge should be more than a conditioned reflex to such an application, especially now that the Supreme Court has provided for judicial review in the circuit courts of appeals at least when an appealable order has been entered.[4] In most if not all cases, refusal to convene a three-judge court will be accompanied by the denial of a preliminary injunction and hence will be appealable. 28 U.S.C. § 1292 (1964).

[6, 7] One other problem remains. The district court not only denied appellants' motions to convene a three-judge court and to grant a preliminary injunction, but also dismissed the complaint. On another record the latter step might well be questionable, since it would dispose, without hearing, of a possible claim for declaratory relief. See Note, The Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation, 83 Harv.L.Rev. 1870 (1970). Such relief, assuming subject matter jurisdiction, would be available from a single judge. But the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1964), is limited in operation to those cases which would be otherwise within the jurisdiction of the federal courts. Jurisdiction in this case depends upon 28 U.S.C. § 1331 (1964), and there is no allegation in the complaint or affidavits of the requisite jurisdictional amount. The situation might be different if the suit challenged a state statute and jurisdiction were asserted under 28 U.S.C. § 1343 (1964). Hague [redacted] C. I. O., 307 U.S. 496, 513, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). The complaint here was properly dismissed. The order of the district court will be in all respects affirmed. All motions made in this court and not heretofore disposed of will be denied.

4. See cases cited at 472 supra.

UNITED STATES of America, Plaintiff-Appellee,

[redacted]

Griffin Thomas WILLIAMS, Jr., Defendant-Appellant.

No. 29219
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Oct. 2, 1970.

Courts ⇐104
Criminal Law ⇐1132

On factors delineated in National Labor Relations Board [redacted] Amalgamated Clothing Workers of America, AFL–CIO, Local 990, 5th Cir., 1970, 430 F.2d 966, under U.S.Ct. of App. 5th Cir., Rules 18 and 21, 28 U.S.C.A., case was placed on summary calendar and decided without opinion.

Appeal from the United States District Court for the Northern District of Georgia at Atlanta; Newell Edenfield, District Judge.

William W. Barham, court-appointed, Atlanta, Ga., for appellant.

John W. Stokes, Jr., U. S. Atty., Allen I. Hirsch, Asst. U. S. Atty., Atlanta, Ga., for appellee.

* Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al., 5th Cir., 1970, 431 F.2d 409, Part I.

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allowance during the four year protective period.

Southern did not offer or advise Sheppard of other railroad employment upon his release following the change in A&EC ownership. Soon after his discharge, Sheppard learned from an independent source of an open job as spike puller with an A&EC labor gang out of Morehead City. He had worked out of New Bern while a diesel mechanic's helper. Southern admits that Sheppard sought and obtained the open position on his own initiative. Sheppard's new employment required different skills than his old job and paid him a lower wage rate.

Sheppard was discharged from the new position as spike puller after only a week because of his intemperate protest [11] when asked to assist in lifting a half-ton motor car from the tracks.

[4] We believe the district court was correct in treating Sheppard's employment as a spike puller "in a manner as if [he] * * * had found work with an employer totally unrelated to railroading." [12] It was, therefore, unnecessary to determine whether Sheppard's second dismissal was for good cause.

[5] We interpret the "Oklahoma conditions" to mean that an employee is not "retained" in a position—and thus *displaced* as opposed to *dismissed*—unless retained at the instance of the railroad. We think that displacement conditions should not be substituted for dismissal conditions except where an employee receives an offer from the railroad to continue in or return to a new position for which he is qualified. Sheppard's second discharge may or may not have resulted from his inability to perform the new work he attempted. Such inability could well account for insubordination and intemperance of language. We need not decide—because he was not notified by the carrier of a position "the duties of which he [was] * * qualified to perform." [13] Thus, Sheppard's obtaining a job as spike puller on his own initiative, as the district court thought, is analogous to a dismissed railroad worker unsuccessfully attempting work other than railroad employment. Such a situation is within the scope and purpose of the dismissal benefits accorded under the Act.

Whether the second dismissal was for cause in the sense that Sheppard could not do the work or for cause in the sense of insubordination, we think the district court rightly adjudged that he lost his job *as a diesel mechanic's helper* as a result of the acquisition of the A&EC by Southern. Southern is, of course, entitled to reduce the compensation owing to Sheppard by the amount of his temporary earnings—whether as a spike puller with the A&EC or in other employment.

10,869, Reversed.
10,870, Affirmed.
10,873, Affirmed.

11. He said: "Wait a God damn minute."

12. Sheppard v. Southern Ry. Co., 258 F. Supp. 217, 222 (1966).

13. Oklahoma Conditions ¶ 5, supra.

Richard WALLACH, Appellant,
v.
CITY OF PAGEDALE et al., Appellees.
No. 18580.

United States Court of Appeals
Eighth Circuit.
May 9, 1967.

Civil rights action seeking redress for the deprivation of rights and conspiracy to interfere with civil rights. The United States District Court for the Eastern District of Missouri, Roy W. Harper, C. J., dismissed the action, 41 F.R.D. 547, and appeal was taken. The Court of Appeals, Van Oosterhout, Circuit Judge, held that civil rights action

was properly dismissed for lack of jurisdiction where plaintiff did not, by his pleadings or in any other manner, meet the burden resting upon him to establish federal jurisdiction.

Affirmed.

See also 264 F.Supp. 271.

1. Injunction ⇐105(1)

Courts of equity do not ordinarily restrain criminal prosecutions.

2. Injunction ⇐105(1)

No person is immune from prosecution in good faith for his alleged criminal acts, and imminence of prosecution even though alleged to be in violation of constitutional guarantees is not ground for equity relief since lawfulness or constitutionality of statute or ordinance on which prosecution is based may be determined as readily in criminal case as in suit for injunction.

3. Courts ⇐508(7)

Where threatened criminal prosecution is by state officers for alleged violations of state law, the state courts are final arbiters of meaning and application of state law, subject only to review by United States Supreme Court on federal grounds appropriately asserted.

4. Constitutional Law ⇐230(3)

Conferring of discretionary power upon administrative board to grant or withhold permission to carry on trade or business properly subject to regulation under police power does not violate Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

5. Courts ⇐260.2

Federal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them.

6. Federal Civil Procedure ⇐1742

Civil rights action was properly dismissed for lack of jurisdiction where plaintiff did not, by his pleadings or in any other manner, meet the burden resting upon him to establish federal jurisdiction. 28 U.S.C.A. §§ 1331, 1343.

Richard Wallach, Wellston, Mo., made argument pro se and filed brief pro se.

Paul J. Boll, St. Louis, Mo., for appellee and filed typewritten brief.

Before VAN OOSTERHOUT, MATTHES and LAY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

The trial court dismissed this action commenced by plaintiff Wallach which asserted jurisdiction in the federal court under 28 U.S.C.A. § 1331 (federal question) and 28 U.S.C.A. § 1343 (violation of civil rights.) Diversity jurisdiction is not asserted and does not exist. The basic grievances asserted here are the same as those urged in Wallach [redacted] City of Pagedale, 8 Cir., 359 F.2d 57, and are asserted damages flowing from alleged violation by defendants of plaintiff's constitutional rights.

Defendants moved for dismissal of the action on the following grounds:

"(a) That the claim asserted against the defendants is not a claim upon [redacted]hich relief can be granted; and

"(b) That this Court has no jurisdiction over the subject matter of the claim presented between the plaintiffs and the defendants.

"(c) That the petition of plaintiff fails to comply with Rule 8, Federal Rules of Civil Procedure in that the averments therein are not *simple, concise* or *direct*, in respect to jurisdiction, facts or relief and is so vague, ambiguous, rambling and full of irrelevant averments that these defendants cannot be reasonably required to frame a responsive pleading thereto."

The motion to dismiss was sustained. The case was dismissed without prejudice for want of jurisdiction. Plaintiff has appealed from such dismissal.

The trial court cited our former opinion in Wallach [redacted]. City of Pagedale, supra. We there stated:

"There is no doubt that the complaint does not comply with Rule 8 (a) as it does not contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'

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The complaint is confusing, ambiguous, redundant, vague, and, in some respects, unintelligible. It is also highly argumentative." 359 F.2d 57, 58.

We went on to state that the pleadings, even if given a liberal interpretation, do not state a cause of action against the defendants within the jurisdiction of the federal court, setting forth the basis for such conclusion and supporting authorities. The complaint now before us is much more extensive than the former complaint but in our view it is in greater violation of Rule 8 than the complaint previously considered.

Plaintiff in his present voluminous, repetitious, confusing and argumentative complaint asserts that he acquired real estate in an unincorporated area in St. Louis County which was zoned as heavy industrial property upon which he was permitted to and did establish a junk yard and automobile wrecking yard in conformity with the St. Louis County zoning ordinance adopted in 1946. It is then asserted that plaintiff's property was maliciously and illegally annexed to the city of Pagedale but no substantial legal grounds are asserted to support the claim of invalid annexation. Plaintiff next asserts in a highly inflammatory manner that numerous zoning and licensing ordinances were passed by the city of Pagedale both before and after the annexation in violation of numerous rights guaranteed plaintiff by the Constitution. Some of such ordinances are cited by number and excerpts of part of the ordinances are set out.

As shown by the complaint, Ordinance No. 88 passed by the city before the annexation provides for the zoning of the city but specifically carries a provision reading:

"The lawful use of land, buildings and structures existing at the time of the adoption of this ordinance may be continued, although such use does not conform to the provisions thereof, but if such non-conforming use is discontinued, any use in the future of such premises shall be in conformity with the provisions of this ordinance."

It would appear from the complaint that Ordinance No. 88 was amended in 1954 to zone the annexed property, including plaintiff's property, with the provisions of Ordinance No. 88 made applicable to the annexed property.

Thus, on their face the ordinances pleaded with respect to zoning appear to protect the rights of nonconforming users and the basis of the asserted invalidity of such ordinances does not reasonably appear in the complaint.

It would seem from the complaint and statements in oral argument that there is a question whether the prior junk yard operation was the plaintiff's own or by a corporation in which he was interested and there is also some intimation that the prior use of the property may have been abandoned.

Plaintiff's principal claims of wrongs committed by the defendants appear to be: (1) His arrest and conviction in the Pagedale police court for operating a junk yard without a license; (2) the city's refusal to permit plaintiff to use his premises for its highest and best use —a junk yard—thereby depriving plaintiff of income needed to pay mortgage indebtedness and the refusal of the city to grant a license to a prospective purchaser which resulted in plaintiff's inability to make an advantageous sale of such property, and his loss of the property through mortgage foreclosure for a sum considerably under its fair value. Plaintiff prays for declaratory judgment and for such further relief as may be just.

It would appear that the claimed grievances arise primarily out of the licensing requirements of the city ordinances.

[1–3] With respect to the propriety of federal courts interfering with state criminal prosecutions, the rule is stated in Douglas v. City of Jeannette, 319 U.S. 157, 163–164, 63 S.Ct. 877, 881, 87 L.Ed. 1324, as follows:

"Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leav-

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ing generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. * * *

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. [redacted] & Farnum Mfg. Co. [redacted] [City of] Los Angeles, 189 U.S. 207 [23 S.Ct. 498, 47 L.Ed. 778]; Fenner v. Boykin, 271 U.S. 240 [46 S.Ct. 492, 70 L.Ed. 927]. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.'"

See Outdoor American Corp. [redacted] City of Philadelphia, 3 Cir., 333 F.2d 963, 965.

No extraordinary circumstances are alleged in our present case which would warrant a departure from the rule just stated. On oral argument, it developed that plaintiff appealed from his conviction and that such appeal is still pending.

We cannot ascertain from the complaint the precise basis or the legal grounds upon which plaintiff claims that a license was denied to him to operate his junk yard in violation of his constitutional rights. Plaintiff quotes part of Ordinance No. 23 relating to licensing of junk dealers and license fees and then asserts that his business does not fall within any of the categories listed in the ordinance. Later plaintiff refers to Ordinance No. 227 relating to regulating, licensing and license fees for automobile lots, and No. 228 with respect to licensing and license fees for salvage yards, both enacted in 1959. Neither of such ordinances are set out in whole or pertinent part. No ascertainable attack is made on the validity of such ordinances but rather the claim is made that the plaintiff's business does not fit the classifications covered by the ordinances. It would appear that the questions raised primarily relate to the interpretation of the ordinances and that such questions are questions of state law.

Plaintiff does not state what attempt, if any, he made to comply with the licensing ordinances nor make any clear-cut allegation that he made any proper application for a license, and if so, that any basis exists for a determination that the city abused its discretion in withholding a license.

[4] In Mosher [redacted] Beirne, 8 Cir., 357 F.2d 638, 640–641, we sustained the dismissal of plaintiff's action based on 28 U.S.C.A. § 1343, wherein plaintiff claimed a city improperly refused him a license to operate a public dance. We stated:

"The rights and necessity for restrictions in municipal zoning ordinances have long been sustained. Village of Euclid, Ohio [redacted] Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 [54 A.L.R. 1016] (1926). It has also been recognized that the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is the proper subject of regulation within the police power of the state is not violative of rights secured by the Fourteenth Amendment, People of State of New

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York ex rel. Lieberman [redacted] Van De Carr, 199 U.S. 552, 26 S.Ct. 144, 50 L.Ed. 305 (1905); and that ordinances validly prohibiting the operation of certain businesses without first obtaining municipal permission do not deprive one of his property without due process of law nor deny [redacted] equal protection of the law, [redacted] City of St. Louis, 194 U.S. 361, 24 S.Ct. 673, 48 L.Ed. 1018 (1904)."

In Garfinkle [redacted] Superior Court of New Jersey, 3 Cir., 278 F.2d 674, the court in affirming the dismissal of an action based on violation of federal constitutional rights concluded, "His stated fundamental facts, irrespective of their fantastic nature, certainly do not show clearly and distinctly that this suit is based on a federal question." What was said there is fully applicable here.

[5] Federal courts have only that jurisdiction which Congress, acting within the limits of the Constitution, confers upon them.

> "The party invoking the district court's original jurisdiction has the duty of affirmatively alleging jurisdiction; and, if his allegations are properly controverted, the burden of establishing jurisdiction. Lack of federal jurisdiction may be raised by motion or in the responsive pleading. And 'whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.'" 1 Moore's Federal Practice 2d Ed. ¶0.60 [4].

See McNutt [redacted] General Motors Acceptance Corp., 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135. Federal Rules of Civil Procedure No. 8(a) (1).

[6] Defendants have by motion attacked the jurisdiction of the federal court to hear this case. Plaintiff has not by his pleadings or in any other manner met the burden resting upon him to establish federal jurisdiction.

The judgment dismissing the petition without prejudice for the lack of jurisdiction is affirmed.

UNITED STATES of America, Appellee,

v.

CUSTER CHANNEL WING CORPORATION and Willard R. Custer, Appellants.

No. 10399.

United States Court of Appeals
Fourth Circuit.

Argued Feb. 8, 1967.
Decided April 3, 1967.

Criminal contempt proceeding initiated by government for violation of injunction prohibiting use of interstate commerce and mails to promote sales of unregistered securities. The United States District Court for the District of Maryland, at Baltimore, [redacted] L. Winter, J., 247 F.Supp. 481, entered judgment of conviction, and appeals were taken. The Court of Appeals, Sobeloff, Circuit Judge, held, inter alia, that where defendants had already breached securities law proscribing sale of unregistered securities to purchasers without access to pertinent financial information and had been enjoined not to do so again, but knowingly repeated selfsame forbidden acts, to be adjudged in criminal contempt, it was enough to show that they intentionally committed acts constituting violation with full knowledge of all relevant circumstances, and proof of evil purpose or bad motive, that is, proof of a specific intent to violate the injunction, was not required.

Affirmed.

1. Licenses ⇐18½(47)

Sale of securities was public offering, and not exempt from registration as a private offering, where none of purchasers had access to kind of information that would have become available to them through a registration statement, although purchasers may have been sophisticated investors. Securities Act of 1933, Schedule A, 15 U.S.C.A. § 77aa, Schedule A; Securities Act of 1933, §§

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inal judgment, it is not unlikely that appellees would have attempted to prepare themselves with evidence relating to the disputed amount. That the appellant's representation in its pre-trial memorandum evidenced its understanding of its burden is confirmed by the fact that it did indeed undertake to offer proof in the presentation of its case in chief. It is essential to the orderly disposition of litigation that parties, as well as courts, be able to rely on procedural courses which have been clearly defined and established in properly conducted pre-trial proceedings.

[9] The entire record supports the District Court's conclusion that the burden of proof in this case rested upon appellant. It had agreed to meet it, and it did not do so. The judgment is

Affirmed.

In the Matter of the Testimony of Phillip Kitzer, Sr., Before the United States Grand Jury—65 GJ 2072.

Appeal of Phillip KITZER, Sr.
No. 15650.

United States Court of Appeals
Seventh Circuit.
Nov. 18, 1966.

Petition seeking relief for allegedly wrongful transmission of testimony, given to Grand Jury in Illinois, to Grand Jury in Minnesota. The United States District Court for the Northern District of Illinois, Eastern Division, William J. Campbell, Chief Judge, entered judgment dismissing the petition without a hearing, and petitioner appealed. The Court of Appeals held, inter alia, that denial of request for order suppressing evidence consisting of testimony allegedly "tainted" on theory that such testimony to Grand Jury in Illinois was wrongfully transmitted to Grand Jury in Minnesota was properly denied without hearing, absent allegations which had not been concluded by Minnesota court's denial of petitioner's motion to dismiss Minnesota indictment.

Affirmed.

1. Injunction ⇐105(1)
Mandamus ⇐61

District court was without jurisdiction to control discretionary actions of Attorney General and could not, on theory that testimony before Grand Jury in Illinois was wrongfully transmitted to Grand Jury in Minnesota, grant relief by way of an order directing Attorney General to move Minnesota District Court to dismiss indictment or an order restraining further proceedings in prosecution of Minnesota indictment. U.S. C.A.Const. Amend. 5; Fed.Rules Crim. Proc. rule 6(e), 18 U.S.C.A.

2. Criminal Law ⇐394.6(5)

Denial of request for order suppressing evidence consisting of testimony allegedly "tainted" on theory that such testimony to Grand Jury in Illinois was wrongfully transmitted to Grand Jury in Minnesota, was properly denied without hearing, absent allegations which had not been concluded by Minnesota court's denial of petitioner's motion to dismiss Minnesota indictment. U.S.C.A.Const. Amend. 5; Fed.Rules Crim.Proc. rules 6(e), 41(e), 18 U.S.C.A.

Doris A. Coonrod, Chicago, Ill., for appellant.

Edward [redacted] Hanrahan, U. S. Atty., Nicholas M. Karzen, Chicago, Ill., for appellee, John Peter Lulinski, [redacted] Jay Weiner, Asst. U. S. Attys., of counsel.

Before KNOCH, KILEY and SWYGERT, Circuit Judges.

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PER CURIAM.

Petitioner Phillip Kitzer, Sr., contends that he was denied due process in violation of the Fifth Amendment of the Constitution because the district court denied him a hearing before entering judgment dismissing his sworn petition. We have considered the briefs and the record in the light of the oral arguments made in this court, and we affirm the judgment.

The substance of the petition is that Kitzer gave certain testimony to the Grand Jury in the Northern District of Illinois, Eastern Division, on the promise of the Assistant United States Attorney that he would not be named in any indictment based upon that testimony; that notwithstanding the promise, the testimony given was transmitted without authority of a court order to a Grand Jury in Minnesota in violation of Fed.R. Crim.P. 6(e); that the subsequent order of the District Court for the Northern District of Illinois authorizing transmission of that testimony to the Minnesota Grand Jury was entered without knowledge of the broken promise to Kitzer and without knowledge that the testimony had already been sent to Minnesota; and that by virtue of the "tainted testimony" petitioner was indicted by the Minnesota Grand Jury following the breach of the promise of the Assistant United States Attorney.

The relief prayed was an order directing the Attorney General of the United States to move the Minnesota District Court to dismiss the indictment or, alternatively, for an order restraining further proceedings in the prosecution of the Minnesota indictment or an order suppressing as evidence in that prosecution the disclosures made by petitioner to the Grand Jury in the Northern District of Illinois.

[1] We think it is clear that the district court was without jurisdiction to control discretionary actions of the Attorney General or to grant the relief requested with respect to him. Goldberg [illegible] Hoffman, 225 F.2d 463 (7th Cir. 1955).

[2] The request for an order suppressing the "tainted" evidence pursuant to Fed.R.Crim.P. 41(e) contained no allegations which had not been concluded by the Minnesota court's denial of petitioner's motion to dismiss the Minnesota indictment. No authority has been cited to support Kitzer's claim to a hearing on his 41(e) motion when a previous motion on the same grounds was denied. We see no merit in this contention and hold that the district court did not err in denying the 41(e) motion without a hearing.

Affirmed.

Roy MUNDRY and Charlotte Mundry, Appellees,

v.

GREAT AMERICAN INSURANCE COMPANY, Appellant.

No. 105, Docket 30364.

United States Court of Appeals
Second Circuit.

Argued Oct. 27, 1966.

Decided Dec. 14, 1966.

Appeal from judgment of United States District Court for the District of Connecticut, 248 F.Supp. 817, Robert C. Zampano, J., holding that the appellant had waived, and was estopped from asserting, its contractual right to disclaim its liability under automobile insurance policy. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that where, Kaufman, Circuit Judge, held that where insurer's disclaimer of liability on automobile liability policy because of noncooperation of insureds was conceded to be timely, plaintiff injured parties were free to discontinue their suit if they thought defendant insureds were judg-

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prosecution and trial on the earlier charge of "uttering a forged instrument." He was subsequently found guilty by a jury in the Circuit Court of the City of St. Louis.

On December 20, 1963, under a writ of habeas corpus, appellant was again brought before the United States District Court and, pursuant to the verdict of guilty returned against him on November 5, 1963, the court sentenced him to two and one-half years imprisonment.

He was then returned to the custody of the State of Missouri and, on February 3, 1964, pursuant to the guilty verdict in the Circuit Court of the City of St. Louis on the charge of "uttering a forged instrument", appellant was sentenced to eight years imprisonment to the Missouri State Department of Corrections. He was also sentenced to a concurrent term of eight years imprisonment on his plea of guilty to the earlier charge of "first degree robbery". Appellant is now in the process of serving these terms at the Missouri State Penitentiary.

[1] A § 2255 motion is not available to attack a sentence which a prisoner has not commenced to serve. Ellison [redacted] United States, 263 F.2d 395 (10 Cir. 1959); Cain [redacted] United States, 249 F.2d 870 (8 Cir. 1955). In Heflin [redacted] United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959), the Supreme Court stated that: "Section 2255 is available only to attack a sentence under which a prisoner is in custody." Id. at 418, 79 S.Ct. at 453.

[2] Appellant's § 2255 motion is premature. He is presently serving, in the Missouri State Penitentiary, the concurrent eight year sentences imposed by the Circuit Court of the City of St. Louis. He will not begin to serve the two and one-half year sentence imposed by the Federal District Court, which he attacks in this § 2255 proceeding, until he has finished service of the State terms.

The order appealed from is affirmed.

Dr. Andrew C. IVY, Plaintiff-Appellant,

v.

Nicholas KATZENBACH, Attorney General of the United States, and Edward [redacted] Hanrahan, United States Attorney for the Northern District of Illinois, Defendants-Appellees.

No. 15094.

United States Court of Appeals
Seventh Circuit.

Sept. 22, 1965.

Certiorari Denied Dec. 13, 1965.
See 86 S.Ct. 437.

Physician, who had promoted drug used in treatment of cancer, and who had been charged with certain offenses by indictment because of his promotion of drug, brought suit against the Attorney General and the United States Attorney for the Northern District of Illinois to enjoin them from proceeding against him in the criminal case and for appointment of impartial medical commission to make a court supervised clinical test of the efficacy of the drug in the treatment of cancer. The United States District Court for the Northern District of Illinois, Eastern Division, Bernard M. Decker, J., entered judgment adverse to the physician, and the physician appealed. The United States Court of Appeals, Castle, Circuit Judge, held that trial of the criminal case prior to an impartial clinical test of the efficacy of the drug in the treatment of cancer would not violate the 5th and 6th Amendment rights to a fair trial and due process of law on ground that resolution of the efficacy issue involved matter beyond the intelligence and comprehension of the jury.

Judgment affirmed.

1. Constitutional Law ⇐268
Federal Civil Procedure ⇐1951
Injunction ⇐105(1)

Prosecution of physician, who had promoted drug used in treatment of cancer, prior to impartial clinical test of efficacy of drug would not violate physician's 5th and 6th Amendment rights to fair trial and due process of law, and physician was not entitled to injunction to en-

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join Attorney General and United States Attorney from proceeding against him in criminal case and appointment of impartial medical commission to make court supervised clinical test of efficacy of drug. 18 U.S.C.A. §§ 371, 1001, 1341; Federal Food, Drug, and Cosmetic Act, § 1 et seq., 21 U.S.C.A. § 301 et seq.

2. Injunction ⇐105(1)

Mere complexity of factual issues to be determined by jury in criminal case is not constitutional basis for precluding trial of criminal case by injunction.

Melvin L. Klafter, Leonard R. Hartenfeld, Chicago, Ill., for appellant.

Edward [redacted]. Hanrahan, U. S. Atty., John Peter Lulinski, Thomas W. James, Asst. U. S. Attys., Chicago, Ill., William W. Goodrich, Asst. Gen. Counsel, Joanne S. Sisk. Atty., Dept. of Health, Education, and Welfare, Washington, D. C., for appellees.

Before CASTLE, KILEY, and SWYGERT, Circuit Judges.

CASTLE, Circuit Judge.

The plaintiff-appellant, Dr. Andrew C. Ivy, brought suit in the District Court against Nicholas Katzenbach, Attorney General of the United States, and Edward [redacted]. Hanrahan, United States Attorney for the Northern District of Illinois, the defendants-appellees, seeking to enjoin them from proceeding against him in a pending criminal cause and for the appointment of an impartial medical commission to make a court supervised clinical test of the efficacy of the drug Krebiozen in the treatment of cancer. Plaintiff's complaint was filed subsequent to the return of the indictment, but prior to the commencement of the criminal trial.[1] Defendants' motion to dismiss on the ground that the complaint does not state a claim on which relief can be granted was allowed and the action was dismissed. Plaintiff appealed.

The prosecution sought to be restrained involves an indictment charging Dr. Ivy, together with three individual and one corporate co-defendants, with conspiracy in violation of 18 U.S.C.A. § 371. Dr. Ivy is named in additional substantive counts, alleged to be overt acts in furtherance of the conspiracy, which charge violations of 18 U.S.C.A. § 1001 (filing false information with agencies of the government), violations of 18 U.S.C.A. § 1341 (use of the mails in furtherance of a scheme to defraud), and violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. § 301 et seq.).

Plaintiff's complaint alleges in substance that plaintiff is a medical scientist of outstanding reputation who has been engaged, since approximately 1950, in experimental studies on the drug Krebiozen; his study and the reports of physicians submitted to him have demonstrated to his satisfaction that Krebiozen has produced favorable results as an anticancer agent and is useful in alleviating the pain usually present in terminal cases; plaintiff, as scientific adviser to the Krebiozen Research Foundation, has never received any remuneration for his advice, and has never submitted any applications to the United States with the object of becoming a sponsor or manufacturer of the drug; he has a mandate from the Illinois legislature to conduct research and investigation on Krebiozen; the gist of the indictment against him is that Krebiozen is a fake cancer drug; the indictment is based upon reports of the National Cancer Institute and the Food and Drug Administration which are erroneous; the only way to prove whether Krebiozen is an effective treatment for cancer is by clinical test which no Federal agency has undertaken; the Secretary of Health, Education, and Welfare by persisting in the view that Krebiozen is a fake, by refusing to acknowledge that there is a difference of opinion about the drug's merits, and by refusing to conduct a clinical test, has caused the dissemination of adverse publicity and is acting

1. At the time of the preparation of this opinion the criminal trial was still in progress.

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arbitrarily and far beyond the exercise of administrative prerogative, and has, through his agents, discouraged physicians from prescribing Krebiozen by implied threats of reprisal by medical associations or the government, and has attempted to discourage patients from using the drug; this conduct of the Secretary has caused Ivy to lose prestige as a professional man, and his rights to practice medicine, to conduct research, and to teach and advocate ideas have been infringed; plaintiff has a legal and moral right to use any drug he regards as safe in treating cancer patients and is compelled to continue to use Krebiozen, which can only result in a multiplicity of civil and criminal actions; only a court of equity, and not a jury, can intelligently determine whether Krebiozen is a fake cancer drug and this determination can only be made after a court supervised clinical test; and that to require plaintiff to defend himself in the criminal trial without a prior clinical test of the drug will deprive him of due process of law. The complaint asserts that the acts complained of violate rights guaranteed to the plaintiff by the 1st, 5th and 6th Amendments to the Constitution of the United States.

The complaint does not challenge the constitutional validity of any of the statutes the indictment charges the plaintiff with violating nor is any allegation made that either of the defendants sought to be restrained is acting other than within the discretionary scope of his duties concerning enforcement of the laws. Apart from the question of the sufficiency of any of the factual allegations made with respect to the actions and conduct of the Secretary of Health, Education, and Welfare to present an issue involving the infringement of any constitutional right of the plaintiff, we perceive no basis either from the averments of the complaint or the applicable law for imputing to the defendants the alleged conduct of the Secretary. And, plaintiff's reliance upon Philadelphia Co. [redacted] Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 [redacted].Ed. 570 as a controlling precedent for the making of such imputation is wholly inapposite.

[1] We are unpersuaded by the plaintiff's contention that a trial prior to an impartial clinical test of the efficacy of Krebiozen in the treatment of cancer would violate his 5th and 6th Amendment rights to a "fair trial" and "due process of law" for the reason that resolution of the efficacy issue presented by some of the counts of the indictment involves matter beyond the intelligence and comprehension of a jury and the complaint thus presents a basis for the injunctive relief sought. In this connection the memorandum opinion filed by the district judge discerningly and aptly points out:

> "Plaintiff's constitutional rights to a fair trial will be protected by the court in the criminal trial. Juries are called every day to determine problems which are not within the scope of their prior knowledge and experience; in these cases, the expert witness is used to bridge the gap between the known and the unknown. Expert witnesses in criminal trials are commonplace; the mere fact that the issues of a case may be complex or confusing to a jury does not mean that they must remain so—the prosecution must clarify the facts in order to present its charges properly. The complexity of the subject matter of a lawsuit cannot be raised to a constitutional issue in advance of its presentation in that lawsuit."

[2] Mere complexity of factual issues to be determined by the jury in a criminal case is not a constitutional basis for precluding the trial.

We agree with the District Court that, contrary to the contentions of the plaintiff, the allegations of the complaint do not present one of those rare instances where considerations like those found in cases such as Dombrowski [redacted] Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, and Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714, require that equity

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should intervene to restrain a pending criminal prosecution. We conclude that the rationale of Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324, is applicable here, and in the language of Dombrowski (380 U.S. p. 485, 85 S.Ct. p. 1120) there are "no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution."

The judgment order appealed from is affirmed.

Affirmed.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

C. L. FRANK, INC., Respondent.

No. 15054.

United States Court of Appeals
Seventh Circuit.

Sept. 27, 1965.

Proceedings on petition for enforcement of an order of the National Labor Relations Board. The Court of Appeals, Castle, Circuit Judge, held that employer's general manager's request that employees caucus and inform him of result was reasonable method of verifying one employee's statement that employees had changed their minds about union representation; and, in context, manager's statement to assembled employees with regard to scheduled increase in wages and his designation of supervisor desired by employees were, if technical violations, so de minimis in nature as to afford no reasonable basis for board's conclusion that they resulted in dissipation of union's majority.

Order accordingly.

Labor Relations ⇐389

Employer's general manager's request that employees caucus and inform him of result was reasonable method of verifying one employee's statement that employees had changed their minds about union representation; and, in context, manager's statement to assembled employees with regard to scheduled increase in wages and his designation of supervisor desired by employees were, if technical violations, so de minimis in nature as to afford no reasonable basis for board's conclusion that they resulted in dissipation of union's majority. National Labor Relations Act, § 8(a) (1, 5) as amended 29 U.S.C.A. § 158(a) (1, 5).

Marcel Mallet-Prevost, Asst. Gen. Counsel, Gary Green, Atty., N. L. R. B., Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Leo N. McGuire, Atty., N. L. R. B., Washington, D. C., for petitioner.

D. Bailey Merrill, William E. Statham, Evansville, Ind., for respondent C. L. Frank, Inc., Merrill, Schroeder & Johnson, McCray, Clark, Statham & McCray, Evansville, Ind., of counsel.

Before SCHNACKENBERG, CASTLE and KILEY, Circuit Judges.

CASTLE, Circuit Judge.

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of the Board's order issued against C. L. Frank, Inc., respondent. The order is based on the Board's findings and conclusions that the Company violated Section 8(a) (5) and (1) of the National Labor Relations Act by refusal to bargain with the Union [1] and that such refusal was not based on any good faith doubt that the Union represented a majority of the employees involved; and that the Company violated Section 8(a) (1) of the Act by directing employees to conduct a poll with respect to the authorization of the Union

1. Chauffeurs, Teamsters and Helpers Local Union 215, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

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occasion it split up a team working on one job to send one member of the team to another job, a practice as to which there is no evidence whatever in the case at bar. Moreover, in the latter case it was found that in the event extra work turned up in the course of a job the applicator was not allowed to contract to do it for the householder on his own account, as in the case at bar, but was required to ask the taxpayer-plaintiff for instructions as to how to proceed. These facts, and others we might mention, differentiate the Security Roofing case from the one now before us.

The case at bar is consistent with the Metropolitan Roofing, Jagolinzer and American Homes cases cited above and not inconsistent with Security Roofing.

A judgment will be entered affirming the judgment of the District Court.

Luther F. GRANT and Sirrka Grant, Petitioners-Appellees,

v.

UNITED STATES of America, Defendant-Appellant.

No. 344, Docket 26183.

United States Court of Appeals
Second Circuit.

Argued May 12, 1960.

Decided July 28, 1960.

Appeal by United States from order of the District Court for the Northern District of New York, James T. Foley, J., 186 F.Supp. 418, refusing to dissolve order staying United States attorney and all other agents and representatives of the United States from submitting evidence relating to taxpayers to a grand jury pending determination of application for return of books and records. The Court of Appeals, Friendly, Circuit Judge, held that where judge signed an ex parte order requiring United States attorney to show cause why taxpayer should not be entitled to return of records or papers voluntarily turned over to agents of Internal Revenue Service and staying United States attorney and all other agents and representatives from submitting any evidence or information to grand jury pending determination of application for order to suppress, and subsequently court signed order, second order was not final and was not appealable as an interlocutory order refusing to dissolve or modify injunction.

Appeal dismissed for want of appellate jurisdiction.

Moore, Circuit Judge, dissented.

1. Courts ⇐405(3.11)

In a civil action a restraining order qua restraining order is not appealable, whereas a preliminary injunction is. 26 U.S.C.A. (I.R.C.1939) § 6531.

2. Courts ⇐405(3.11)

Label put on order by trial court is not decisive whether order constitutes a restraining order or preliminary injunction within rule that restraining order qua restraining order is not appealable whereas a preliminary injunction is, but rather the courts look to such factors as duration of order, whether it was issued after notice and hearing, and type of showing made in obtaining order.

3. Courts ⇐405(12.1, 12.12)

Where court signed ex parte order requiring United States attorney to show cause why records taxpayer had made available to agents of internal revenue service should not be suppressed and staying United States attorney and all other agents and representatives from submitting any evidence or information to grand jury pending determination of application, and subsequently court signed order refusing to dissolve stay and reserving decision as to vacation of original order to show cause until

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hearing, second order was not final and was not appealable as an interlocutory order refusing to dissolve or modify injunctions. 28 U.S.C.A. §§ 1291, 1292(a)(1); Fed.Rules Civ.Proc. rule 65(b), 28 U.S.C.A.

4. Injunction ⇐105(1)

District judges do not have unlimited discretion to stay government or its agents from presenting evidence to grand jury pending a hearing on motion to suppress evidence and evidentiary hearing should not be set as a matter of course but only when petition alleges facts which if proved would require grant of relief. Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

5. Searches and Seizures ⇐7(28)

Taxpayers do not make a showing of violation of constitutional guarantees by alleging only that they turned over their books and records voluntarily to Treasury agents for examination and such books and records were found to contain evidence leading government to assert criminal liability.

6. Criminal Law ⇐394.6(5)

In those cases where an evidentiary hearing is required on application for order to suppress evidence, court should proceed in an expeditous manner consonant with summary character of remedy. Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

7. Injunction ⇐105(1)

Possible expiration of a period of limitations is highly relevant to the exercise of court's discretion in staying government or its agents from presenting evidence to grand jury pending hearing on motion to supress such evidence. Fed.Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

8. Courts ⇐404

Abuses of discretion by trial court in ordering a hearing on motion to suppress evidence or in the scope or duration of a stay pending such hearing can be corrected by Courts of Appeals through issuance of mandamus. Fed. Rules Crim.Proc. rule 41(e), 18 U.S.C.A.

Kenneth P. Ray, Asst. U. S. Atty., Syracuse, N. Y. (Theodore F. Bowes, U. S. Atty., Northern Dist. of New York, Syracuse, New York, on the brief), for appellant.

Joseph W. Burns, New York City (John P. Cuddahy and Austin, Burns, Appell & Smith, New York City, and George Bond, Jr., N. Earle Evans, Jr. and Bond, Schoeneck & King, Syracuse, New York, on the brief), for appellees.

Before CLARK, MOORE and FRIENDLY, Circuit Judges.

FRIENDLY, Circuit Judge.

Luther F. Grant and his wife Sirrka Grant are physicians practicing in Liberty, New York. Luther applied on their joint behalf to the District Court for the Northern District of New York, pursuant to Fed.R.Crim.Proc. 41(e), 18 U.S.C., for an order suppressing as evidence records and papers that he had made available to agents of the Internal Revenue Service. He alleged that the records had been obtained in violation of the Fourth and Fifth Amendments and that the United States attorney was about to present to a grand jury information relating to petitioners' tax liability derived from them.

Upon this application, Judge Foley, sitting in Albany, signed an *ex parte* order dated February 26, 1960, requiring the United States attorney to show cause on the judge's next scheduled motion day at Albany, March 21, 1960, why petitioners should not be granted the relief sought. The order stayed the United States attorney and all other agents and representatives of the United States "from submitting any evidence or information to a Grand Jury or from taking any other or further proceedings in relation to the above captioned petitioners pending the determination of this application * * *". At the same time the judge signed an order, also *ex parte*, granting petitioners leave under Fed.R. Civ.Proc. 26(a), 28 U.S.C., to serve notice of the taking of depositions of four revenue agents prior to the expiration

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of 20 days after the commencement of the action on the ground "that their testimony is desired for use at the hearing of petitioners' motion to suppress illegal evidence * * *, and that it is essential that their testimony be taken prior to such hearing." Pursuant to such leave petitioners served notice that the depositions would be taken on March 8, 1960 and a subpoena commanding a special agent to bring copies of the manuals and instruction to revenue agents and special agents, "all documents, papers, books, records, memoranda, reports, diaries and objects maintained or obtained" by two agents, and "copies or extracts of books and papers made by them as a result of examinations or investigations" relating to the tax affairs of the petitioners.

When Judge Foley arrived in Syracuse on March 1, 1960, to commence a trial term, an assistant United States attorney asked him to vacate the order of February 26. The judge declined to do this but signed an order, supported by affidavits of the United States attorney and two revenue agents, requiring the petitioners to show cause on March 7 "why an order should not be made dissolving the injunction and vacating the order to show cause granted by this Court on the 26th day of February 1960." Petitioners submitted answering affidavits on the return day. After considering the affidavits and hearing counsel, Judge Foley, on March 8, 1960, made a Memorandum-Decision and Order, 186 F.Supp. 418, refusing to dissolve the stay (although modifying it to permit the institution of a complaint before a United States Commissioner under 6531 of the Internal Revenue Code of 1954, 26 U.S.C. § 6531, to toll the statute of limitations) and reserving decision as to vacating the original order to show cause until the hearing. From this the United States appeals.

We meet at the outset the question, not discussed by the parties, whether the order is appealable. Manifestly the order was not final; hence it is not appealable under 28 U.S.C. § 1291. However, the order of February 26 contained language of restraint, and we must consider whether the order of March 8 is an interlocutory order "refusing to dissolve or modify injunctions" and therefore appealable within 28 U.S.C. § 1292(a)(1).

[1, 2] If appealability were governed by 28 U.S.C. § 1292(a)(1), we would be required to determine whether the February 26 order was a temporary restraining order or a preliminary injunction. For "In a civil action a restraining order *qua* restraining order is non-appealable," 7 Moore, Federal Practice, ¶ 65.07, at 1649 (2d ed. 1955); Schainmann [redacted] Brainard, 9 Cir., 1925, 8 F.2d 11, whereas a preliminary injunction is. However, "the label put on the order by the trial court is not decisive; instead the courts look to such factors as the duration of the order, whether it was issued after notice and hearing, and the type of showing made in obtaining the order." 3 Barron & Holtzoff, Federal Practice and Procedure, § 1440, at 509 (Wright ed. 1958). The authors aptly add, "Application of these tests is not easy to fathom." Fed.R.Civ.Proc. 65(b) provides that any temporary restraining order granted without notice "shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period * * *" Sims v. Greene, 3 Cir., 1947, 160 F.2d 512, held that an order originally issued on December 2, 1946, extended on December 20 without objection until January 14, 1947, and thereafter con[redacted]ed from time to time until Febru[redacted]3, during which time a long evidentiary hearing was held, had ceased to be a temporary restraining order and had become a preliminary injunction subject to appeal under what is now 28 U.S.C. § 1292(a)(1). On the other hand, Connell [redacted] Dulien Steel Products, Inc., 5 Cir., 1957, 240 F.2d 414, 415, certiorari denied, 1958, 356 U.S. 968, 78 S.Ct. 1008, 2 L.Ed.2d 1074, held that an order labelled a "temporary restraining

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order" did not cease to be one because it restrained pending decision on a motion for a preliminary injunction which was scheduled to be heard 28 days thence, see 71 Harv.L.Rev. 550 (1958). And the Third Circuit has decided similarly with respect to a stay that was to remain in effect until the application for the temporary injunction was heard, when the appeal was taken prior to the expiration of 20 days. Pennsylvania Motor Truck Ass'n [redacted] Port of Philadelphia Marine Terminal Ass'n, 1960, 276 F.2d 931. Here the minimum period of restraint was 24 days, only four more than the 20 permitted by Rule 65(b), a period that might have been accepted by consent under the express terms of the rule or would undoubtedly have been shortened had the court been requested to do so; the order was issued without notice and hearing; and the judge had not made the preliminary determination of the rights of the parties required for issuance of a temporary injunction. On the other hand, as demonstrated by the order permitting petitioners to take depositions, the hearing scheduled for March 21 was evidently intended to be the final hearing, so that the stay may be said to have performed the traditional office of an injunction *pendente lite*, "to preserve the *status quo* pending final determination of the action after a full hearing." 7 Moore, Federal Practice, ¶ 65.04, at 1625 (2d ed. 1955).

The difficulty in resolving these conflicting considerations suggests that we may not be asking the right question and that we ought examine a more basic one, namely, whether 28 U.S.C. § 1292(a) (1) applies at all to preliminary stays in summary proceedings to suppress illegally obtained evidence. This in turn requires analysis of the nature of a motion to that end made before any criminal proceeding is pending.

Fed.R.Crim.Proc. 41(e) provides that "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained" on various grounds therein specified. It directs that "The judge shall receive evidence on any issue of fact necessary to the decision of the motion." The rule embodies a practice which long antedated it but whose jurisdictional character, at least in those cases where the motion precedes the criminal proceeding to which the evidence relates, has been little discussed. We have said that such a motion "was in effect a complaint initiating a civil action," Lapides v. United States, 2 Cir., 1954, 215 F.2d 253, 254; Russo v. United States, 2 Cir., 241 F.2d 285, 287, certiorari denied, 1957, 355 U.S. 816, 78 S.Ct. 18, 2 L.Ed.2d 33, and so it is in the sense with which the Court was there mainly concerned, namely, its independence from the later criminal proceeding and the consequent appealability of a final order therein under 28 U.S.C. § 1291. However, the jurisdictional grants in 28 U.S.C. §§ 1331–1358 will be searched in vain for any rubric under which such a motion falls, in the absence of any allegation of jurisdictional amount that would bring it under § 1331, see Centracchio v. Garrity, 1 Cir., 1952, 198 F.2d 382, 385, certiorari denied, 1952, 344 U.S. 866, 73 S.Ct. 108, 97 L.Ed. 672. The classical exposition of the nature of such a motion is Judge Hough's statement in United States [redacted] Maresca, D.C. S.D.N.Y.1920, 266 F. 713, 717:

> "Whenever an officer of the court has in his possession or under his control books or papers, or (by parity of reasoning) any other articles in which the court has official interest, and of which any person (whether party to a pending litigation or not) has been unlawfully deprived, that person may petition the court for restitution. This I take to be an elementary principle, depending upon the inherent disciplinary power of any court of record.
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> "Attorneys are officers of the court, and the United States attorney does not by taking office escape from

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this species of professional discipline. Thus power to entertain this motion depends on the fact that the party proceeded against is an attorney, not that he is an official known as the United States attorney. It is further true that the right to move does not at all depend on the existence of this indictment; it might be made, were no prosecution pending."

See also Go-Bart Importing Co. v. United States, 1931, 282 U.S. 344, 355, 51 S.Ct. 153, 75 L.Ed. 374; Foley v. United States, 5 Cir., 64 F.2d 1, 3, certiorari denied, 1933, 289 U.S. 762, 53 S.Ct. 796, 77 L.Ed. 1505.

When motions under Rule 41(e) or the practice preceding it are independent of a criminal proceeding, the courts entertain appeals from final orders denying the return of papers, Perlman [redacted]. United States, 1918, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950; Essgee Co. [redacted] United States, 1923, 262 U.S. 151, 43 S.Ct. 514, 67 L.Ed. 917; Go-Bart Co. [redacted] United States, supra, or granting such return, Burdeau [redacted]. McDowell, 1921, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048. In contrast, when the motion is made after indictment, neither its denial, Cogen [redacted]. United States, 1929, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275, nor its grant, Carroll [redacted] United States, 1957, 354 U.S. 397, 77 S.Ct. 1332, 1 L.Ed.2d 1442, is appealable. We have found no case sustaining appellate jurisdiction from any order in such a proceeding save a final one.

We do not think an order, made in the exercise of "the inherent disciplinary power" of the court, directing one of its own officers to refrain from using books and papers claimed to have been unlawfully taken until the court can determine his right to use them, is an order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions" within 28 U.S.C. § 1292(a)(1), even if the stay runs beyond the 20-day period permitted for temporary restraining orders by Fed.R.Civ.Proc. 65(b) and we should assume that the Rule is fully applicable.[1] Section 1292(a)(1) stems from § 7 of the Evarts Act, c. 517, 26 Stat. 828, providing, by way of exception to the requirement of finality, "That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals"; orders denying such injunctions were first added in 1895, c. 96, 28 Stat. 666. The section as it appeared in the Judicial Code of 1911, § 129, 36 Stat. 1134, continued to be prefaced by the words "Where upon a hearing in equity in a district court," and the omission of the words "in equity" in the Act of February 13, 1925, 43 Stat. 937, "was not intended to remove that limitation." Schoenamsgruber [redacted] Hamburg American Line, 1935, 294 U.S. 454, 457, fn. 3, 55 S.Ct. 475, 477, 79 L.Ed. 989; see Baltimore Contractors, Inc. [redacted]. Bodinger, 1955, 348 U.S. 176, 180, fn. 6, 75 S.Ct. 249, 99 L.Ed. 233. Whatever might be the case when a person seeking

1. The case for applicability is that the action is "of a civil nature," Fed.R.Civ. Proc. 1, since "Whether an action is civil or criminal by nature is determined by the sanctions sought to be imposed," 7 Moore, Federal Practice ¶ 81.02, at 4431 (2d ed. 1955); see United States [redacted]. Stangland, 7 Cir., 1957, 242 F.2d 843, 846, and does not come within any of the exclusions of Rule 81. In Russo [redacted]. United States, supra, 241 F.2d at pages 287-288, we held Rule 26(a) applicable in a proceeding like the present. However, since the Federal Rules of Civil Procedure were "primarily designed for plenary litigation," 7 Moore, Federal Practice ¶ 81.06, at 4442 (2d ed. 1955), it does not necessarily follow that they must be literally applied to proceedings under Fed.R.Crim.Proc. 41(e) which are summary in character, even when these are pre-indictment. Cf. Goodyear Tire & Rubber Co. v. N.L.R.B., 6 Cir., 1941, 122 F.2d 450, 451, 136 A.L.R. 853.

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the return of property alleged to have been illegally seized proceeds by a plenary action under an appropriate jurisdictional statute, see Goodman [redacted] Lane, 8 Cir., 1931, 48 F.2d 32; cf. Eastus [redacted] Bradshaw, 5 Cir., 94 F.2d 788, certiorari denied, 1938, 304 U.S. 576, 58 S.Ct. 1045, 82 L.Ed. 1539, such language is hardly apt to describe a preliminary step in a special proceeding where, in the course of exercising its "disciplinary powers" "summarily to determine" what one of its own officers should do, Go-Bart Co. [redacted] United States, supra, 282 U.S. at page 355, 51 S.Ct. at page 157 the court instructs him, *ex parte*, not to take action pending the determination that might impair the court's ability to grant full relief. Such a proceeding normally would not have the three stages—temporary restraining order, preliminary injunction, and final decree—characteristic of "a hearing in equity"; the first evidentiary hearing would usually be the last and the proceeding would generally be determined before an appeal from an interlocutory order could be heard.

The Baltimore Contractors case itself teaches that not every request for an order containing words of restraint is one for an injunction within § 1292(a)(1). So does Fleischer [redacted] Phillips, 2 Cir., 264 F.2d 515, 516, certiorari denied, 1959, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030, where we said, also dealing with officers of the court, that "the prayers for injunctive relief add nothing to the orders denying the motions and render neither of them automatically appealable under 28 U.S.C. § 1292(a)(1)." And United States [redacted] Rosenwasser, 9 Cir., 1944, 145 F.2d 1015, 156 A.L.R. 1200, held that an order suppressing evidence and restraining the United States from using copies of the seized records or information derived therefrom in any proceeding of any kind, which was not appealable as final because it was sought only after the information had been filed, could not be appealed as an interlocutory order granting an injunction although literally it assuredly was.

[3–8] Our holding that the order here sought to be reviewed is not appealable does not mean that district judges have unlimited discretion to stay the government or its agents from presenting evidence to a grand jury pending a hearing on a motion to suppress. Fed.R.Crim.Proc. 41(e) requires that evidence be taken on "any issue of fact necessary to the decision of the motion." It follows that evidentiary hearings should not be set as a matter of course, but only when the petition alleges facts which if proved would require the grant of relief. We find it somewhat hard to see how the petition here met this test, since the constitutional guarantees are not violated when taxpayers' books and records, voluntarily turned over to Treasury agents for examination, are found to contain evidence leading the government to assert criminal liability, Russo [redacted] United States, supra; United States [redacted] Sclafani, 2 Cir., 265 F.2d 408, certiorari denied 1959, 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534; Centracchio [redacted] Garrity, supra; the fact that one of the agents was a special agent (whose presence, petitioners allege, shows an intent to develop facts leading to criminal prosecution) has been held irrelevant, Turner [redacted] United States, 4 Cir., 222 F.2d 926, 930, certiorari denied 1955, 350 U.S. 831, 76 S.Ct. 65, 100 L.Ed. 742; and the only affirmative misrepresentation alleged as to the nature of the investigation postdated the voluntary delivery of the records. In those cases where an evidentiary hearing is required, the court should proceed in an expeditious manner consonant with the summary character of the remedy and with a recognition that "It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found." Cobbledick [redacted] United States, 1940, 309 U.S. 323, 327, 60 S.Ct. 540, 542, 84 L.Ed. 783. The possible expiration of a period of limitations is, of course, highly relevant to the exercise of the court's discretion. Abuses of discretion in or-

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dering a hearing or in the scope or duration of a stay can be corrected by courts of appeals through the issuance of mandamus. 6 Moore, Federal Practice, ¶ 54.10 [4], at 87 (2d ed. 1955). Here, however, appellant has not requested such relief, see Zamore v. Goldblatt, 2 Cir., 1953, 201 F.2d 738, the stay was to continue only until the next motion day of the court in Albany, and the issue would doubtless have been settled long ago if the government had complied with the order to show cause instead of taking this appeal.

The appeal is dismissed for lack of appellate jurisdiction.

MOORE, Circuit Judge (dissenting).

This appeal tests the regularity of the proceedings instituted by the taxpayers (referred to as "the taxpayer") to enjoin the United States Attorney from submitting to a Grand Jury any evidence of any crime whatsoever, or taking any other proceedings, against them. The injunction thus has the effect of enjoining *pro tanto* the Grand Jury in its time-honored function of investigating crime. The reason asserted in the petition supporting this drastic request is in substance, that, although "petitioner, either personally or through employees in his office, did make available to said [Internal Revenue] agents all of his books, records and papers and those of his wife, including among others, daily log books, check books, bank statements, bank books, cancelled checks, stock records, books and papers," that he did not do so "for purposes of any criminal investigation."

The taxpayer sought a return of these papers and an injunction against their use (and leads therefrom) by an order to show cause pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. This Rule permits a person "aggrieved by an unlawful search and seizure" to move the district court for the return of the property and its suppression as evidence. Of the grounds specified in the Rule the only one possibly applicable is that "the property was illegally seized without warrant." The order was sought "to initiate this special proceeding." It was issued *ex parte* on February 26, 1960 and enjoined the government from submitting any evidence (regardless of any relationship whatsoever to the material sought to be suppressed) pending the determination of the application. Since the return date was March 21, 1960, the minimum period of injunction was 24 days. The date of entry of an order after decision could have extended this period substantially.

Simultaneously a motion was made, also without notice for an order pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, for leave to serve notice of taking depositions of various government agents prior to the expiration of 20 days after the commencement of "this action." The affidavit supporting this *ex parte* "civil procedure" motion recites that "this action" is the order to show cause under the "criminal procedure" rule. Again without notice this motion was granted.

On March 4, 1960, the court issued a further order to show cause "why an order should not be made dissolving the injunction" and vacating the first order of February 26th. On March 8th the court concluded that a hearing should be held and reserved decision on the motion to dissolve the injunction until the hearing had been held. From the order of March 8th the government appeals.

In summary, an order to show cause—at best a motion under section 41(e) of the criminal rules—containing a "without notice" injunction of 24 days or more simultaneously with its issuance is metamorphosized into a civil "action" on the basis of which another "without notice" order for leave to take depositions under section 26(a) of the civil rules is issued.

Under what authority of law is this baffling procedure conducted? Certainly some legal justification must be found before approving the steps here taken. Despite the fact that no jurisdictional sanction is given in any of the grants specified in 28 U.S.C.A. §§ 1331–1358, as

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pointed out in Centracchio [redacted] Garrity, 1 Cir., 1952, 198 F.2d 382, at page 385:

"it has long been accepted that where evidence, obtained by an unconstitutional search and seizure in violation of the Fourth Amendment, is in the hands of a United States attorney, a federal district court may entertain and grant relief on a petition, filed even prior to any indictment, seeking a return of the papers or property unconstitutionally seized and the suppression of the same as evidence. (Citing cases)"

This court in Lapides [redacted] United States, 2 Cir., 1954, 215 F.2d 253, at page 254, described a somewhat similar proceeding as follows:

"Appellant's 'motion' was in effect a complaint initiating a civil action seeking suppression of evidence said to have been illegally obtained and to restrain the United States Attorney from presenting such evidence to the grand jury. The suit thus began before any criminal proceedings by the government against appellant had been instituted, and his appeal was therefore not from an interlocutory order entered in the course of a criminal suit. Accordingly, the order denying his motion was a final and appealable order."

If the order to show cause be tantamount to a civil action (and apparently the taxpayer would so regard it by seeking to avail himself of the civil deposition rules), then the other civil rules are equally applicable. Federal Rules of Civil Procedure 65(b) specifically provides that every temporary restraining order "shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period."

The language of this Rule is significant. The restraining power of the court is restricted and by the words "shall expire" the order became self-terminating in 10 days, i. e., March 7th. No good cause for the permissive extension was shown nor was any extension granted. Therefore even if the injunction had had any effect under the guise of a temporary restraining order between February 26th and March 7th it could continue thereafter only as a preliminary injunction. The order of March 8th of necessity had to be an order "refusing to dissolve" an injunction. The fact that the court's memorandum-decision-order did not use the words "granted" or "denied" is not determinative. The injunction was continued by the order and hence must be regarded as a refusal to dissolve it.

The entire purpose of the temporary restraining order rule would be frustrated if it were allowed to be disregarded at will. Ten days was the maximum period during which the enjoined party was to be restrained without opportunity for appellate review. Over the years courts have become more and more reluctant to enjoin without notice; rules and statutes express this policy. The right of appeal from a preliminary injunction is a purposeful exception to the general rule requiring finality. Since "preliminary" by definition precedes "final," the presently imposed restraint must be preliminary because the order to be entered after any hearing will be final. Although I agree that an appeal cannot be taken from a temporary restraining order this limitation applies only to this type of order as authorized by law. The very "label" argument advanced by the majority cannot create an order which had no legal being after March 7th merely by calling it a temporary restraining order.

The trial court states that his powers of restraint are supported by precedent, citing In re Fried, 2 Cir., 161 F.2d 453, 1 A.L.R.2d 996; Application of Bodkin, D.C., 165 F.Supp. 25 and Lapides [redacted] United States, 2 Cir., 1954, 215 F.2d 253.

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Upon the appeals by the taxpayers and the government in Bodkin after a stipulation by the taxpayers "to grant the government all the relief to which it could be entitled on a successful appeal" the appeal was dismissed as moot. However, the district court's judgment was vacated and the complaint dismissed. This court specifically referred to our express disapproval of Bodkin in United States v. Sclafani, 2 Cir., 1959, 265 F.2d 408. Examining the Bodkin case, a situation most comparable to the present case appears, i. e., a motion to suppress and restrain under Federal Rule of Criminal Procedure 41(e), depositions under Federal Rule of Civil Procedure 26. The same grounds, in substance, were advanced, namely, that the original voluntary surrender of their books by the taxpayers for tax audit became involuntary when subsequently facts were thereby disclosed indicating criminal liability. The hearing must have been in the nature of a full-scale trial because over 1,000 pages of testimony were taken. Bodkin,[1] expressly disapproved, does not furnish a precedent as to procedure. Lapides, as here, was a pre-indictment order to show cause. As this court on review said, "Nothing in said order suggested that the hearing thus set was to be a preliminary hearing only" (215 F.2d 253, 256). Nor was any question there raised as to the nature of the injunctive provisions.

As to the substantive law, whether the papers on which the order to show cause was granted be regarded as a Rule 41(e) motion or as a complaint in a civil action or even as a unique hybrid, they must possess legal sufficiency. Giving to the taxpayer's affidavit the most liberal construction as a complaint and at the same time regarding the same papers as an application for a preliminary injunction pending trial and final judgment of the issues there tendered, it fails to meet the legal requirements for suppression. Stripped of its conclusory assertions, the taxpayer alleges that some time after he had voluntarily made available his books he was "shocked" when he was advised that as a result of the investigation criminal proceedings might be instituted, that he had thought, as the agents had represented, that a "routine" examination only was being made and that the agents had never "implied or said that there was the remotest possibility that either fraud or criminal proceedings were under consideration."

In Sclafani it was held that under quite similar circumstances "the failure to disclose the changing course of the investigation is not fraudulent or deceitful" (265 F.2d 408, 414) and that:

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
>
> "'Surely defendant was aware that, if a "routine audit" revealed evidence of criminal liability, the agent would not ignore it merely because he was primarily concerned with civil liability. * * * A statement that the purpose of an investigation is a "routine audit" is not the equivalent of a promise that only civil liability will be considered regardless of what the examination reveals. Nor would any accountant or businessman so understand it.' United States v. Wolrich, D.C.S.D. N.Y.1954, 119 F.Supp. 538, 540 (Dimock, J.).
>
> "Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government

1. "See United States v. Sclafani, 2 Cir., 265 F.2d 408, which expressly disapproves Matter of Bodkin, D.C.E.D.N.Y. 1958, 165 F.Supp. 25." 2 Cir., 266 F. 2d 56.

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would be impossible to discharge in fact, and would serve no useful purpose."

The same principle was stated in Russo [redacted] United States, 2 Cir., 1957, 241 F.2d 285 (Clark, then Chief Judge, Lumbard and Waterman, C. JJ.). The Fourth Circuit rejected a taxpayer's contention which the court stated as follows:

"The contention seems to be that revenue agents who secure the consent of a taxpayer to an examination of his books with intent to obtain evidence and use it in a criminal prosecution, are guilty of deceit unless they divulge their purpose, and that the obtaining of information in such a manner violates the Fourth Amendment and its introduction in evidence violates the Fifth Amendment; and even if the examination is begun solely to ascertain the civil liability of the taxpayer and evidence of crime is unearthed, the taxpayer must be warned and given an opportunity to withdraw his consent, or all information subsequently obtained is inadmissible in a criminal prosecution." Turner [redacted] United States, 4 Cir., 1955, 222 F.2d 926, 930.

And in Centracchio [redacted] Garrity, 1 Cir., 1952, 198 F.2d 382, at page 387, the Court said:

"On the face of the petition in the present case, and certainly on the evidence offered by petitioner at the hearing before the district court, it is clear that the evidence in question did not come into the possession of the government officials in violation of petitioner's rights under the Fourth Amendment. He voluntarily turned over the evidence, and made the disclosures, to the agents of the Internal Revenue Bureau, for the purpose of a determination of his income tax liabilities."

In conclusion I cannot reconcile the result reached by the majority with the language of the opinion. If, as they say, "Our holding that the order here sought to be reviewed is not appealable does not mean that district judges have unlimited discretion to stay the government or its agents from presenting evidence to a grand jury pending a hearing on a motion to supress," how can the discretion be limited except by appeal? Assume that a judge disregards the 10 days' temporary restraining order limitation and grants 90 days. The restrained party has no other recourse than to move to vacate. A refusal to vacate continues the injunction. If this order is not appealable, the discretion remains "unlimited." Add to this situation the ingredient that the supporting papers do not support as a matter of law. How can relief against an improper injunction be secured except by appeal? It is all very well to say what difference does it make whether matters are called motions or actions, preliminary, temporary, civil or criminal but far more is at stake than mere words. Just as on the sea experience has proven that a maximum of safety for all is obtained by the formulation of definite rules of navigation and adherence thereto, so is it equally important that the procedures specified in legal rules be followed. The opinion of Judge Biggs of the Third Circuit (a circuit which has rather taken the lead in strict limitation upon appealability) is most apposite. Sims [redacted] Greene, 3 Cir., 1947, 160 F.2d 512. There the district court had disregarded the time provisions of Rule 65(b). He said at page 516:

"It is settled that no temporary restraining order may be continued beyond twenty days unless the party against whom the order is directed consents that it may be extended for a longer period."

Denying the motion to dismiss the appeal and reversing the order, the court concluded at page 517:

"In our opinion the restraining order now in effect in the District Court must be treated as a temporary injunction, issued without the consent of the defendant, in the face

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of his motion to dissolve it, and contrary to the provisions of Rule 52 (a). It is clear that an appeal lies from a temporary injunction. Deckert v. Independence Shares Corporation, 311 U.S. 282, 61 S.Ct., 229, 85 L.Ed. 182. The appeal at bar therefore may not be dismissed and the order restraining the defendant must be reversed."

Insofar as the decision of the Fifth Circuit in Connell v. Dulien Steel Products, 5 Cir., 1957, 240 F.2d 414 (temporary restraining order issued after notice) differs from Sims v. Greene, I believe that the Third Circuit's interpretation better follows the words and intent of the Rule.[1]

Following the type of relief granted in Sims v. Greene, I would hold that the order of March 8th is an order refusing to dissolve an injunction and hence appealable. On the appeal I would vacate the stay order of February 26th as extended in effect by the order of March 8th. I concur with the majority in their views with respect to the lack of sufficiency of the petition because the law is clear that upon the facts therein alleged the taxpayer is not entitled to an order of suppression. In connection with the pre-indictment preliminary attacks upon evidence, which are apparently becoming increasingly popular, it might be well to remember the words of a distinguished jurist (L. Hand, C. J.) in In re Fried, 2 Cir., 1947, 161 F.2d 453, 465:

"It would be an intolerable burden upon the prosecution of crime, if it were possible to test in advance the competency of evidence which an accused, to say nothing of a prospective accused, might be able to show was likely to be used against him. The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society; but so is the effective prosecution of crime, an interest which at times seems to be forgotten."

1. The recent case in the Third Circuit, Pennsylvania Motor Tr. Ass'n v. Port of Phila. M. T. Ass'n, 3 Cir., 1960, 276 F.2d 931, is not to the contrary. There the appeal was argued and dismissed within the permissive period authorized by Rule 65(b).

LIZZA AND SONS, INC., Plaintiff, Appellant,

v.

Daniel A. D'ONFRO et al., Defendants, Appellees.

No. 5571.

United States Court of Appeals
First Circuit.

Aug. 18, 1960.

Action by general contractor against contractor and surety for breach of alleged subcontract. The United States District Court for the District of Massachusetts, 186 F.Supp. 428, Charles Edward Wyzanski, Jr., J., dismissed the complaint, and general contractor appealed. The Court of Appeals, Hartigan, Circuit Judge, held that where, after negotiations, contractor drafted a contract and delivered it to general contractor, who made deletions, without contractor's manifested assent, and returned signed draft to contractor, contractor's subsequent compliance with general contractor's request for a copy of the draft did not constitute acceptance of the terms.

Judgment affirmed.

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Under I.R.C.1939, § 272(a)(1), (f), and (k), 26 U.S.C.A. § 272(a) (1), (f, k), the first notice of deficiency was clearly sufficient; and since timely filing is made jurisdictional, the Tax Court correctly held that it could not hear the petition. Galvin [redacted] C. I. R., 2 Cir., 239 F.2d 166. Cases cited, such as D[redacted]lek [redacted] C. I. R., 94 U.S.App.D.C. 97, [redacted] F.2d 458, and Teel [redacted] C. I. R., 27 T.C. 375, affirmed 10 Cir., 248 F.2d 749, do not hold to the contrary, while Eppler [redacted] C. I. R., 7 Cir., 188 F.2d 95, and Cole [redacted] C. I. R., 30 T.C. 665, affirmed 2 Cir., 272 F.2d 13, are not in point, since in each of these cases the first letter had been sent to the wrong address.

The decision of the Tax Court is affirmed.

Harold R. STEINER, Appellant,

v.

Theodore HOCKE, United States Commissioner for the Southern District of California, Central Division, and Robert W. Ware, United States Marshal for the Southern District of California, Appellees.

James S. FREW, Appellant,

v.

Theodore HOCKE, United States Commissioner for the Southern District of California, Central Division, and Robert W. Ware, United States Marshal for the Southern District of California, Appellees.

Misc. Nos. 895, 896.

United States Court of Appeals
Ninth Circuit.
Nov. 5, 1959.

Accused, who had been indicted in the United States District Court for the Eastern District of Michigan for alleged[redacted] mailing circulars in violation of the Obscene Mail Statute, and who had been arrested on the indictments at their residences in the Southern District of California where proceedings for their removal were instituted before the United States Commissioner, brought suits in equity in the United States District Court for the Southern District of California against the United States Commissioner and the United States Marshal to enjoin their removal. The United States District Court for the Southern District of California entered orders dismissing the suits on the merits and ordered removal of accused, and accused appealed from the orders and made a motion in the Court of Appeals for a stay of removal pending disposition of the appeals. The Court of Appeals held that stay would be denied, on ground that courts of equity do not ordinarily restrain criminal prosecution.

Stay denied and appeal dismissed.

Injunction ⇐105(1)

Where accused was indicted in United States District Court for the Eastern District of Michigan for allegedly mailing circulars in violation of Obscene Mail Statute and were arrested on such indictments at their residences in Southern District of California where proceedings for removal of accused were instituted before United States Commissioner, and thereupon accused filed suits in equity against United States Commissioner and United States Marshal in United States District Court in Southern District of California to enjoin removal of accused, on ground that circulars were identical with circulars which had previously been adjudged properly mailable in actions by third person against Los Angeles postmaster, and the District Court dismissed suits on merits and ordered removal of accused, and accused appealed to Court of Appeals and made motion in Court of Appeals for order staying removal pending disposition of appeals, Court of Appeals would deny stay on ground that courts of equity do not ordinarily restrain criminal prosecu-

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tions. 18 U.S.C.A. §§ 1461, 1462; U.S. C.A.Const. Amend. 1.

Brock, Fleishman & Rykoff, Hollywood, Cal., for appellants.

Laughlin E. Waters, U. S. Atty., Richard A. Lavine, Jordan A. Dreifus, Asst. U. S. Attys., Los Angeles, Cal., for appellees.

Before POPE, HAMLEY and KOELSCH, Circuit Judges.

PER CURIAM.

The appellants have each been indicted in the United States District Court for the Eastern District of Michigan for allegedly mailing circulars in violation of the "Obscene Mail Statute", 18 U.S.C.A. §§ 1461 and 1462 as amended August 28, 1958. They were arrested upon these indictments at their residences in the Southern District of California where proceedings for their removal were instituted before the United States Commissioner. Thereupon each of them filed a suit in equity in the District Court for the District last mentioned against the Commissioner and the United States Marshal of said District, seeking to enjoin their removal. The grounds stated for the injunction sought were that the circulars they were charged with having caused to be delivered by mail in the Michigan district were the identical circulars which had theretofore been adjudged properly mailable, and whose mailing was held protected by the First Amendment in certain actions previously brought by one Toberoff against the Los Angeles postmaster.[1] Appellants alleged in such suits in equity, that the judgments in the former actions had finally adjudicated that the circulars were properly mailable, that the indictments now pending had been sought only to harass the appellants, that the District Court in Michigan was without jurisdiction to try appellants, that the Government is estopped by the rule of res judicata, and of estoppel by judgment to prosecute appellants for mailing the circulars, and hence the removal should be enjoined and prevented.

The court below dismissed these suits on the merits, on the ground that appellants had an adequate remedy at law. Thereafter the court below, acting through another judge, ordered the removal. These appeals were taken and now appellants move us to order a stay of the removal pending disposition of the appeals from the orders dismissing the equity suits.

Appellees, in response, show that appellants have given bail bonds on removal calling for their appearance in the Michigan District to answer the indictments there. By that procedure, appellees say, appellants are now under obligation to respond in the Michigan district, and no officer in the State of California has any further function to perform in connection with their removal. Appellees move to dismiss the appeal as (1) moot, and (2) frivolous.

We deny the stay upon grounds analogous to those discussed in Beal v. Missouri Pacific R. Co., 312 U.S. 45, 61 S.Ct. 418, 420, 85 L.Ed. 577, namely, that "courts of equity do not ordinarily restrain criminal prosecutions." While that case dealt with an attempted restraint of state prosecutions, we think the quoted rule is equally applicable to restraints of federal prosecutions. While great inconvenience will result from appellants having to defend in Michigan, yet, as in the case cited, there is no showing at this date, and obviously could not

1. Appellants alleged in their respective complaints that after these judgments had been made, they had purchased the business of the concerns which had been operating them at the time the postmaster had attempted to stop the mailing of the circulars out of which those actions arose. We do not reach the question whether these appellants were in sufficient privity with the original parties so as to permit application of the rules of res judicata or of collateral estoppel. Nor do we come to the question as to whether the judgments against the postmaster bound the United States. For the purpose of this order we assume that these questions may be answered in the affirmative.

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be, that more than one criminal prosecution is threatened. We find no reason here why appellants should be permitted to depart from the ordinary rule that equity will not intervene in criminal prosecutions.

Since a removal order is, under the scheme of the rules and the statutes, not appealable, we think it would frustrate that scheme if a defendant could, as attempted here, frame an issue in equity designed to force an adjudication in his home district of a defense that will be fully available to him at the place of the indictment. The 1958 amendment of the statute suggests a further reason why the Congressional purpose to permit prosecutions at the place of receipt of the circulars should not be frustrated by the device here employed. See U. S. Code Congressional and Administrative News, 85 Cong., Second Session, 1958, Vol. 2, p. 4012.

The stay is denied and the appeal is dismissed.

Fred T. STOCKWELL, Appellant,
v.
Harry FRIBERG et al., Appellees.
No. 13857.

United States Court of Appeals
Sixth Circuit.
Dec. 14, 1959.

Action for alleged loss of constitutional civil rights of plaintiff while in custody of city police and for alleged illegal transportation of his person into another state. The United States District Court for the Northern District of Ohio, Kloeb, J., rendered judgment dismissing complaint with prejudice, and plaintiff appealed. The Court of Appeals, held that order dismissing complaint with prejudice would be affirmed.

Affirmed.

Civil Rights ⇐13

Complaint for alleged loss of constitutional civil rights of plaintiff while in custody of city police and for alleged illegal transportation of his person into another state was insufficient.

Fred T. Stockwell, Toledo, Ohio, on brief in pro. per. for appellant.

William D. Driscoll and Ben Neidlinger, Toledo, Ohio (Louis R. Young, Director of Law, by William D. Driscoll, Toledo, Ohio, on the brief), for appellees.

Before McALLISTER, Chief Judge and MARTIN and CECIL, Circuit Judges.

PER CURIAM.

This case came on to be heard on this first day of December, 1959, the appellant having been duly notified of the setting.

The appeal has been heard and considered upon the brief and reply brief of appellant, Frank T. Stockwell, and upon the brief and oral argument of the appellee, appellant having made no appearance at the hearing in person or by attorney.

The action of appellant was to recover damages for the alleged loss of his "constitutional rights while in the custody of the Toledo, Ohio, Police, and for the illegal procedures involved which brought about the illegal transportation of his person into the State of Michigan." He prayed an award of damages in the amount of Five Million Dollars ($5,000,000) and that the amount awarded by the jury be tripled and declared tax free.

We find no merit whatever in appellant's contention that his constitutional civil rights have been violated; and, for the reasons stated in the opinion of United States District Judge Kloeb, we affirm his order dismissing the complaint with prejudice.

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ACKERMAN, Atty. Gen. [redacted] INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION et al.

BEVINS, County Atty. et al. [redacted] INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION et al. (two cases).

ACKERMAN, Atty. Gen. et al. [redacted] INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION et al.

Nos. 12300, 12301.

United States Court of Appeals, Ninth Circuit.

Feb. 28, 1951.

Rehearing Denied May 25, 1951.

Two actions by International Longshoremen's & Warehousemen's Union, a voluntary unincorporated association and labor union, and others, against Walter D. Ackerman, Jr., individually and as Attorney General of the Territory of Hawaii, and others, and against E. R. Bevins, individually and as County Attorney for the County of Maui, and others, to enjoin the prosecution of four criminal proceedings pending in the Circuit Court of the Territory of Hawaii, one for riot and conspiracy and three for riot. The United States District Court for the Territory of Hawaii, John Biggs, Jr., Circuit Judge, and Delbert E. Metzger and George B. Harris, District Judges, entered final decrees granting permanent injunctions, and Walter D. Ackerman, Jr., and E. R. Bevins, individually, and others, appealed. The Court of Appeals, Pope, Circuit Judge, held that injunctions on ground of exceptional circumstances and irreparable injury were improper.

Judgments reversed with directions.

1. Courts ⇐262.7(24)

In suit to enjoin prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against members of union for alleged acts of violence during strike, alleged efforts of pickets to prevent nonstriking workmen from entering plant, beatings by pickets and assaults which allegedly prevented loading of products on barges had no relation to any rights granted by the Labor Management Relations Act, or Civil Rights Act or to constitutional rights to free speech, press, assembly and peaceful picketing so as to justify injunctive relief on ground that prosecutions interfered with collective bargaining or legitimate activity. Rev.Laws Hawaii 1945, §§ 11120, 11570–11584, National Labor Relations Act, 29 U.S.C.A. § 151 et seq.; Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq., 8 U.S.C.A. §§ 41, 43, 44, 46, 47, 49(a); U.S.C.A.Const. Amends. 1, 5, 6, 14, 19.

2. Courts ⇐262.7(24)

Alleged activity of pickets in forcefully preventing nonstriking workers from entering plant, beating of nonstrikers, and acts of force preventing supervisory employees from unloading employer's product upon barges, involved conduct, policing of which was left wholly to territory of Hawaii in which alleged acts occurred. Rev.Laws Hawaii 1945, §§ 11120, 11570–11584.

3. Courts ⇐262.6(1)

Mere proof of bad faith of prosecutors is not sufficient to warrant enjoining criminal proceeding.

4. Courts ⇐262.6(2), 262.7(3)

In suit to enjoin prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against members of union for alleged acts of violence during strike, constitutionality of statutes could be determined as readily in criminal cases as in suit for injunction. Rev.Laws Hawaii, 1945, §§ 11120, 11570–11584.

5. Courts ⇐406.3(9)

In suit to enjoin prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against members of union for alleged acts of violence during strike, trial court's finding to effect that prosecutions were not begun in good faith was clearly erroneous. Rev.Laws Hawaii 1945, §§ 11120, 11570–11584.

6. Injunction ⇐109

In suit to enjoin prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against members of union for alleged acts of violence during strike, facts that no one had been prosecuted under first statute except in connection with labor dispute, that there were mass arrests, that excessive bail was required, that police did not contemplate complaints until directed by prosecuting officers, and that statutes with heavy pen-

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alties were invoked for minor infractions, among other things, did not establish lack of good faith on part of prosecutors. Rev. Laws Hawaii 1945, §§ 11120, 11570–11584.

7. Courts ⇐262.6(4)

In suit to enjoin prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against members of union for alleged acts of violence during strike, where constitutionality of statutes could be tested in criminal proceedings and there was no evidence to support finding that criminal prosecutions were not in good faith, plaintiffs were not entitled to have prosecutions enjoined on grounds of exceptional circumstances and irreparable injury. Rev.Laws Hawaii 1945, §§ 11120, 11570–11584.

8. Courts ⇐262.6(4)

In suit to enjoin pending prosecutions under Hawaiian unlawful assembly and riot act and conspiracy statute against union members for alleged acts of violence during strike, where complaint contained no allegations to support injunction against future criminal proceedings but merely alleged that enforcement would deprive plaintiffs of their liberty and property without due process of law, that they would be prohibited from exercising rights of free speech, press and assemblage, and that union could not function, no injunction should have been granted. Rev.Laws Hawaii 1945, §§ 11120, 11570–11584.

9. Courts ⇐508(1)

Federal court cannot interfere in case where proceedings are already pending in state court.

10. Courts ⇐432

It is not function of federal court of equity to exercise supervisory control over action of territorial court.

11. Injunction ⇐105(1)

Rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions has no exceptions, and extraordinary circumstances will not create jurisdiction.

12. Courts ⇐262.6(1)
Injunction ⇐105(1)

Equity will stay its hand with respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, and rule is applied both by state courts and by federal court when asked to enjoin criminal proceedings in federal court.

13. Injunction ⇐105(1)

Rule that equity will stay its hand with respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a principle expressing sound policy that processes of criminal law should be permitted to reach orderly conclusion in criminal courts where they belong.

14. Courts ⇐262.6(1)

Ordinarily, federal court should not interfere with state officers charged with duty of prosecuting offenders against state laws.

15. Courts ⇐262.4(5), 432

Where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to people of state or territory should as a matter of discretion be left by federal courts to courts of the legislating authority unless exceptional circumstances command different course.

Walter D. Ackerman, Jr., Atty. Gen. Territory of Hawaii, J. Garner Anthony, Special Deputy Atty. Gen., Rhoda [redacted]. Lewis, Asst. Atty. Gen., Richard K. Sharpless, Deputy Atty. Honolulu, T. H., for appellants.

Bouslog & Symonds and Harriet Bouslog, all of Honolulu, T. H., for appellees.

Thomas M. Waddoups, Samuel P. King, Edward N. Sylva, H. R. Hewitt, W. B. Stephenson and J. Donovan Flint, all of Honolulu, T. H., for Bar Association of Hawaii, as amicus curiae.

Before DENMAN, Chief Judge, ORR and POPE, Circuit Judges.

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POPE, Circuit Judge.

These are appeals from judgments in two actions brought by the International Longshoremen's & Warehousemen's Union (ILWU), a labor union, and by certain individual members of that union, to enjoin the prosecution of four criminal proceedings pending in the circuit court of the Territory of Hawaii, one for riot and conspiracy, and three for riot. The court below entered final decrees granting permanent injunctions as prayed, against the Attorney General of the Territory, the County Attorney and Deputy County Attorney of the County of Maui, and in one case the County Chief of Police.

The criminal charges grew out of certain disorders which occurred during separate strikes by sugarworkers, and pineapple workers, members of the ILWU union. On the morning of October 16, 1946, during the sugarworkers strike, some three to four hundred members of that group were in a picket line, four columns deep, before the entrance to the sugar mill of Maui Agricultural Company at Paia, on the Island of Maui. Five workmen employed in the mill appeared for the purpose of crossing the picket line and going to work. The same men had attempted to pass through to work the previous day, but had been prevented because the pickets stood shoulder to shoulder. On the 16th a number of police were on hand.[1] As the mill whistle blew the five men, escorted by the police, started toward the mill entrance. Two hundred of the pickets converged on the five men and pushed them back. Upon a second attempt to pass the five workmen and the police were pushed back 10 or 12 feet farther. This ended the attempts to enter the mill. There is no finding that any blows were struck.

In consequence of this incident some 75 men have been indicted, charged with riot and conspiracy under the Territorial unlawful assembly and riot act, Chap. 277 Rev.Law of Hawaii, 1945, §§ 11570–11584, and the Territorial conspiracy statute, Rev.Laws of Hawaii, 1945, § 11120.[2]

The other three criminal proceedings grew out of incidents later occurring in connection with the pineapple workers strike, on the Island of Lanai, also in the County of Maui. On July 14, 1947, as several supervisory employees of the Hawaiian Pineapple Company, not members of the union, were about to load upon a barge some pineapples picked before the strike and then in bins upon the wharf, about 300 union pickets led by union "picket policemen" ran toward the men on the wharf, yelling "at the tops of their voices", caught and beat one of the men, chased and "punched at" another, forcing him and another man to jump into the water to escape, broke open the bins and threw pineapples at the barge and tug and at the men in the water.

Two complaints, charging riot, were filed against persons accused of participating in this incident. In one case eleven defendants, and in the other, 36 defendants, were committed after waiving preliminary examination, to await the action of the grand jury.

On the day following the incident at the wharf, 20 to 25 persons headed by "union police" with arm bands, went to the rooms of two non-striking truck drivers employed by the Hawaiian Pineapple Company on the Island of Lanai, and administered "a severe beating" to both of them. A complaint, charging riot, was filed against five persons charged with par-

1. The opinion of the district court states that at this time "After certain preliminary conversations between members of the ILWU, Kealoha, Joseph Kaholokula, and others, respecting the entry of the five workmen to the mill it was stated by Kaholokula that if the five men tried to cross the picket line, 'police or no police', there would be violence and bloodshed." 82 F.Supp. 65, 79.

2. The pending indictment is the second one in the same case. A plea to the first indictment, challenging its sufficiency, was denied by the circuit court and an interlocutory appeal allowed to the Supreme Court of Hawaii, which construed the criminal statute, and held it constitutional, but found the indictment fatally defective in form. Territory of Hawaii v. Kaholokula, 37 Haw. 625. The second indictment followed.

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ticipating in this affair. They also were committed awaiting action by the grand jury. The prosecution of these defendants and of the other defendants similarly bound over, has proceeded no further by reason of the injunctions issued by the court below.

The individual plaintiffs in these actions are the defendants in the four criminal proceedings mentioned, plus two officials of the union who purport to sue on behalf of themselves and all other members of the union in the Territory.

Judgment in No. 12301 was based upon a complaint seeking to enjoin further prosecution of the proceeding in which the indictment was returned. The complaint in No. 12300 sought similar relief in respect to the three proceedings in which commitments had been made. Both complaints allege that in furtherance of the objectives of the strikes, which were to obtain better wages, hours, and conditions of employment, the individual plaintiffs engaged in "lawful, peaceful and constitutionally protected activities of speech, press and assemblage and of peaceful picketing." The unlawful assembly and riot statute and the conspiracy statute are attacked as unconstitutional in that they are alleged to deprive plaintiffs of their rights of free speech, press and assemblage and will subject them to criminal prosecutions if they exercise their constitutional rights. It is alleged that the grand jury which found the indictment was chosen and composed in an unconstitutional manner. Prayer was for injunction prohibiting the enforcement of the criminal statutes mentioned, that prosecution of the criminal proceedings be enjoined, and that the statutes be held unconstitutional.

The trial court[3] recognized that the prayer for an injunction restraining the prosecution of criminal proceedings posed serious difficulties, and in this connection quoted from the opinion of Chief Justice Stone in Douglas v. City of Jeannette, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 87 L.Ed. 1324, as follows: "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.'"

But the trial court held that the facts of this case were such as to take it outside of the ordinary rule that courts of equity will not enjoin criminal prosecutions; that it involved exceptional circumstances which permit injunctive relief, and that there has been a disclosure of the "irreparable injury 'both great and immediate'", mentioned in Douglas v. City of Jeannette, supra.

The court found two such special circumstances. First, it said, "All collective bargaining in the Territory of Hawaii in our opinion is substantially affected by the two statutes[4] as well as by the prosecutions

3. The case was heard before the decision in Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 69 S.Ct. 606, 93 L.Ed. 741, by three judges who, although of the opinion they were properly constituted as a court of three judges under Title 28, U.S.C.A. § 2281, held that if that section had no application, they were in any event a district court "sitting in bank". Since the decision and all rulings were unanimous, the circumstance of three judges participating we consider of no significance here. The extended opinion of the court is reported in 82 F.Supp. 65.

4. [i. e., the unlawful assembly and riot act and the conspiracy statute, both of which the court held unconstitutional.]

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conducted or about to be carried on thereunder. Approximately thirty thousand members of the ILWU and the union itself necessarily feel the impact of the statutes as does each employer in the sugar and pineapple industries. All labor relations in the Islands are clouded by them. On the records presently before us we think it is fair to state that equable or amicable relations between employers and employees in the Territory of Hawaii are impossible while the statutes stand. The repercussions which arise from the enforcement of these statutes of the Territory are such as to cause great and irreparable harm and damage to all labor relations in Hawaii."

This portion of the opinion of the court was bottomed upon the case of A. F. L. v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873. The trial court's opinion quoted from that case what was there said of the requirement of proof of "irreparable injury which is clear and imminent" as follows: "That is a strict test. But we think appellants satisfy it. We reach that conclusion on the basis of the allegations concerning the disruption of the collective bargaining processes and the injury to the unions and to the employers alike, if the closed-shop agreement is outlawed. As we have said, it is averred that there are about 500 contracts with Florida employers containing closed-shop agreements * *". 82 F.Supp. 65, 109.

We are unable to perceive any resemblance between the facts here and those in A. F. L. v. Watson, supra. There it appeared that the plaintiff labor unions were engaged in negotiating closed shop agreements, as they asserted they had the right to do by virtue of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. and that the proceedings which the Attorney General of Florida proposed to institute against them, pursuant to the newly adopted Florida constitutional amendment, was an imminent threat to an entire system of collective bargaining, involving 500 contracts, and many thousands of employees.

5. 29 U.S.C.A. § 141 et seq.

[1, 2] Here there is no showing of any attempted collective bargaining, or other legitimate union activity with which any act here charged to the defendants could possibly interfere. The evidence shows, on the contrary, that the activities in which the plaintiffs were engaged at the time of the occurrence out of which the criminal prosecutions arose had nothing to do with any right granted by the Labor Management Relations Act, 1947,[5] the Civil Rights Act,[6] or Amendments I, [illegible] VI, XIV and XIX to the Constitution, upon which plaintiffs' rights are alleged to be founded. The activities and conduct of the plaintiffs here, (characterized by the trial court as the "illegal conduct of the strikers") involved the sort of conduct "policing of [which] is left wholly to the States. * * No one questions the State's power to police coercion by those methods." International Union, U. A. W. [illegible] Wisconsin Employment Relations Board, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651.

Perhaps implicit in the trial court's finding that labor relations and collective bargaining were adversely affected, is the court's apparent view that the very existence of an unconstitutional act upon the statute books operated as a psychological obstacle to labor activities and negotiations. Such an argument, if sound, would lead to the result that an injunction might issue in any case where an unconstitutional statute might constitute a mental hazard. Thus the statute attacked in Douglas [illegible] City of Jeannette, supra, was unquestionably unconstitutional, for the court so held in Murdock [illegible] Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, yet the bill in the Jeannette case was held to be without equity. No doubt the invalid ordinance there was as much of a psychological hazard to the Jehovah's Witnesses, as the statutes here attacked could be to union labor.

[3] The other exceptional circumstance which the court held justified enjoining the criminal proceedings, was found in the determination that the prosecution of these

6. 8 U.S.C.A. §§ 41, 43, 44, 46, 47, 49(a); 28 U.S.C.A. § 1343.

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proceedings was not in good faith. The trial court did not undertake to cite any case in which proof of bad faith in a criminal prosecution was held to establish reason for departure from the ordinary rule that a court of equity will not entertain a suit to enjoin criminal prosecutions. The court evolved its conclusion that want of good faith was a sufficient reason for issuing such an injunction from the phraseology used in Douglas v. City of Jeannette, supra, that "courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from *prosecution in good faith* for his alleged criminal acts." (Emphasis added.) The court reasoned that in inserting the words "in good faith" in the quoted language, the court was at least implying that only prosecutions *in good faith* are immune from equity injunctions, and hence if bad faith be shown the criminal prosecution may be enjoined. We think this purely textual analysis of the quoted language is not warranted, for to say that one is not immune from prosecution in good faith does not imply that one is immune from prosecution in bad faith, and may enforce that immunity by injunction. The trial court recognized that "the motive of the prosecutor is of course not relevant to the ordinary criminal proceeding."

We cannot bring ourselves to believe that a defendant in a criminal case, who would not be permitted to plead or prove as a defense to the charge, that the prosecutor's motives were bad, could nevertheless by alleging such bad faith and the invalidity of the criminal statute, move into a court of equity and have those issues tried there. No case has been called to our attention which has applied the trial court's theory that proof of bad faith in the criminal prosecution is sufficient to warrant enjoining the criminal proceedings.[7]

The trial court has failed to note what appears to us to be the probable reason for the use of the words "prosecution in good faith" in the sentence quoted from the Jeannette case. Appellants have called our attention to the fact that the statement: "No citizen * * * is immune from prosecution, in good faith, for his alleged criminal acts", was first used in decisions following Hague v. C. I. O., 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423. Such decisions, thus referring to "prosecution in good faith", are Beal v. Missouri-Pacific R. Corp., 312 U.S. 45, 49, 61 S.Ct. 418, 85 L.Ed. 577; Watson v. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 4416, and Douglas v. City of Jeannette, supra.

[4] We think a more likely explanation of the use of this phrase is that the Supreme Court had in mind such cases as Hague v. C. I. O., supra, in which it appeared that plaintiffs seeking to hold peaceful meetings and to distribute literature were threatened with arrest under the void Jersey City ordinance, and their associates had been arrested and carried out of the city, all in line with a deliberate policy of excluding and removing plaintiffs' agents from Jersey City. Indeed, the Jeannette case, supra, 319 U.S. at page 164, 63 S.Ct. at page 881, made specific reference to this aspect of the Hague case in distinguishing it. Another type of case is that represented by Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, where the applicant for injunction was confronted with threatened prosecution under a statute imposing such large penalties he dare not test its validity by violation inviting prosecution. Because of the special facts which were present in Hague v. C. I. O. and Ex parte Young, the applicants for injunction had

7. On the contrary, compare Kentucky v. Powers, 201 U.S. 1, 26 S.Ct. 387, 50 L.Ed. 633. A claim of denial of constitutional rights and of official bad faith, oppression and misconduct in the prosecution of petitioner in a state court was made in a petition for removal. Petitioner was remanded to the custody of the State authorities. Even where the bad faith charged against the prosecutor involved the knowing use of perjured testimony, and a deliberate suppression of evidence, and hence was itself a denial of due process, the petitioner for federal court action (habeas corpus), was required first to exhaust his remedy in the state courts. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791. Accord, Ex parte Hawk, 321 U.S. 114, 116, 64 S.Ct. 448, 88 L.Ed. 572.

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no reasonable opportunity to test their rights in the criminal cases. For this reason the threatened prosecutions there were not in good faith. In those cases it could not be said, as it was in Douglas [redacted] City of Jeannette, that "the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." Such, we think, is the case here.

[5–7] Furthermore, we think want of good faith was not proven, and the court's finding in that respect clearly erroneous. The principal ground of bad faith is said to be that "no one has been prosecuted under the unlawful assembly and riot act except in connection with labor disputes". But unless riots did occur at places and under circumstances not involving labor disputes which called for complaints which the prosecutor refused or neglected to file, the quoted statement has no significance. It is not claimed, and there was no allegation or proof that there were any such unprosecuted violations. The remainder of the circumstances listed by the court's opinion as evidence of bad faith, it seems to us, are no more than expressions of the trial court's opinion that the prosecution was too vigorous, or that the police officers rather than the prosecuting attorney, should have selected the statute under which complaint would be filed, or that the methods used in securing evidence were poor.[8] In our opinion these circumstances are insufficient to establish want of good faith. We must therefore disagree with the conclusion of the trial court that the facts here present extraordinary circumstances to take this case out of the ordinary rule that a court of equity will not enjoin a criminal prosecution.

But there is a further reason why, in our opinion, these cases cannot, in any event, warrant the granting of injunctions. In Babcock [redacted] Noh, 9 Cir., 99 F.2d 738, 739, this court said: "In support of the decree appellee argues broadly that a court of equity may enjoin a criminal prosecution under a void statute where such prosecution amounts to a wrongful invasion of a property right, [citing cases]. However, the present suit is not within the principle announced in these authorities. What was sought in those cases was relief against threatened, not pending, prosecutions; and in them the court proceeded upon the view that one is not compelled to test the constitutionality of an act by first incurring

8. The trial court's enumeration of the facts thought to show bad faith was as follows: "In this connection the following facts among others in the instant cases are pertinent: (1) (a), the mass arrests, and the very broad, indeed, the too broad field, from which the police drew the defendants in the various criminal proceedings after both the Paia and the Kaumalapau Harbor incidents, demonstrated by the fact that the names of sixteen persons were stricken out of one of the complaints and that of ninety-three arrests made on the Island of Oahu on July 13, 1947 only one person, viz. Sibolboro, was subjected to prosecution, all other complaints being nolle prossed; (b) the naming of persons as defendants in criminal proceedings from photographs taken by the police both prior and subsequent to the occurrence of the Kaumalapau Harbor incident; * * * (d) the excessive bail required of many of the plaintiffs in the instant cases; (2) the fact that Assistant Chief of Police Freitas did not read the unlawful assembly and riot act to the strikers during the Paia or Kaumalapau incidents and did not contemplate the swearing out of a complaint against any of the plaintiffs under that statute until directed to do so by the prosecuting officers of Maui County; (3) the repeated selection of the unlawful assembly and riot act with its heavy penalties as the vehicle for the prosecution of comparatively minor infractions of the criminal laws; (4) the haste with which the prosecuting officers of Maui County procured the second indictment of Kaholokula and others when the first indictment was held invalid by the Supreme Court of Hawaii; (5) the fact, for we have found it to be a fact, that no one has been prosecuted under the unlawful assembly and riot act except in connection with labor disputes at any time during the life of the Territory; and (6) the fact that the maximum penalty under the unlawful assembly and riot act was increased from five years' imprisonment to twenty years' imprisonment in 1929, following the Filipino workers' strike in 1924."

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drastic penalties attached to its violation, but may, under extraordinary circumstances, appeal to equity for relief against the invasion of his property rights through the threatened enforcement of the statute. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714; Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Terrace v. Thompson [263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255]. Here, no threat of the institution of other criminal proceedings under the act is alleged in the bill or found to have been made. The relief sought is against the further prosecution of the pending case."

[8] The injunctions here issued related solely to prosecutions *then pending*.[9] There is no injunction against any *threatened* prosecutions. The complaints contained no allegations to support an injunction against future or threatened criminal proceedings. The only allegation of future damage was that the criminal statutes "will deprive plaintiffs of their liberty and property without due process of law, in that plaintiffs will be prohibited from exercising their rights of free speech, press and assemblage in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States," and that the union could not function "so long as the members of the said ILWU are subject * * * to prosecution under statutes containing unconstitutional limitations." This falls far short of an allegation that these plaintiffs were threatened with prosecution under the statutes on account of peaceful picketing, publicizing, bargaining, or exercising other constitutional rights and privileges. This defect in the complaints was called to the attention of the court and of the plaintiffs by motions which pointed out the failure to complain of threatened future action,[10] but the motions were denied. The court made no finding that future prosecutions were threatened.

[9] The rule stated in the Babcock case was that declared in Ex parte Young, 209 U.S. 123, 162, 28 S.Ct. 441, 455, 52 L.Ed. 714, as follows: "But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court." The same rule was followed and applied in Cline v. Frink Dairy Co., 274 U.S. 445, 452–453, 47 S.Ct. 681, 71 L.Ed. 1146.

[10] The distinction stated in the Babcock case, between pending and threatened prosecutions, is founded upon certain fundamental characteristics of equity jurisdiction. The first to be noted is that stated in Douglas v. City of Jeannette, supra, 319 U.S. at page 165, 63 S.Ct. at page 882: "In any event, an injunction looks to the future." In the case before us all that is drawn in question are past acts. There is no proof or finding that for exercising lawful rights plaintiffs are threatened with future prosecutions under the statutes they assail. Thus, for the court below to assume to enjoin prosecution of the four pending proceedings is to assume to exercise a supervisory control over the action of the Territorial court. Such is not the function of a court of equity.

The second circumstance basic to this distinction was pointed out in the quoted portion of the Babcock opinion which states that where the prosecution is threatened, not pending, "one is not compelled to test the constitutionality of an act by first incurring drastic penalties attached to its violation, but may, under extraordinary circumstances, appeal to equity * * *" etc. Ex parte Young, which dealt with a statute having drastic penalties, is a classic example of such a situation. Here, on the contrary, in the four pending actions, the

9. The injunction in No. 12301 was "from proceeding with the prosecution commenced in October, 1946." That in No. 12300, was "from proceeding with the prosecution commenced August 1, 1947." Both dates were prior to the commencement of the suits.

10. Motions for more definite statement, to dismiss, and for summary judgments recited: "The complaint fails to show that said plaintiffs are threatened with more than one criminal proceeding, or that anything at all is involved other than prosecution of an alleged violation of the criminal laws of the [redacted] of Hawaii, with respect to matters which have already occurred."

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plaintiffs have at hand full opportunity to test their rights by defending in those proceedings. As this court said in Alesna v. Rice, 9 Cir., 172 F.2d 176, 177, "Had the prosecution of the information proceeded, the jury might have acquitted the defendants, appellants, and the constitutional and other questions avoided. In any event, the appellants had a speedy and sufficient remedy at law by appeal to the Hawaiian Supreme Court, where the appellants' arguments of the two contentions may have prevailed. Losing, there is the appeal here. In both appellate courts the practice gives primacy of consideration to criminal appeals."

[11] The rule that equity jurisdiction does not extend to enjoining pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction.

[12, 13] That equity will stay its hand in respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a rule of wide and general application under our legal system. It is a rule of the state courts in respect to criminal proceedings in the same or other state courts. Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239, 144 N.W. 764, 49 L.R.A.,N.S., 951; State ex rel. Kenamore v. Wood, 155 Mo. 425, 56 S.W. 474, 48 L.R.A. 596. Federal courts apply the same rule when asked to enjoin criminal proceedings in the federal courts. Argonaut Mining Co. v. McPike, 9 Cir., 78 F.2d 584; Whitehead v. Cheves, 5 Cir., 67 F.2d 316, 317, certiorari denied 290 U.S. 704, 54 S.Ct. 371, 78 L.Ed. 605; Campbell v. Medalie, 2 Cir., 71 F.2d 671, certiorari denied 293 U.S. 592, 55 S.Ct. 108, 79 L.Ed. 686. It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong.

[14] But when the demand for an injunction is presented to a federal court, asking an injunction against proceedings in a state or territorial court, the reasons of policy against any such action are multiplied because of the necessity of avoiding whenever possible conflict between the two judicial systems. This policy was stated in Fenner v. Boykin, 271 U.S. 240, 243, 46 S.Ct. 492, 493, 70 L.Ed. 927: "Ordinarily, there should be no interference with such officers; primarily, they are charged with the duty of prosecuting offenders against the laws of the state, and must decide when and how this is to be done. The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection. The Judicial Code provides ample opportunity for ultimate review here in respect of federal questions. An intolerable condition would arise, if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court."

[15] That this policy applies to proposals to enjoin proceedings in the courts of Hawaii as well as to similar injunctions directed against state courts, we stated in Alesna v. Rice, supra: "The Jeannette case concerned the enjoining of state prosecutions. We think the criminal laws of the Territory of Hawaii are entitled to the same protection. Section 86(c) of the Hawaiian Organic Act, 48 U.S.C. § 642, 48 U.S.C.A. § 642, provides that the United States District Court for the District of Hawaii 'shall have the jurisdiction of district courts of the United States, * *.' * * * This court has recognized that the Organic Act places the courts of the Territory of Hawaii in a relatively similar position to the federal judicial system as are the state courts. See Wilder's S. S. Co. v. Hind, 9 Cir., 108 F. 113, 115, 116, affirmed 183 U.S. 545, 22 S.Ct. 225, 46 L.Ed. 321, and Yeung v. Territory of Hawaii, 9 Cir., 132 F.2d 374, 378." And since our decision in that case, the Supreme Court stated the reason for assimilating the position of the Hawaiian courts to that of State courts in Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 383, 69 S.Ct. 606, 614, 93 L.Ed. 741, as follows: "Entirely aside from the question of the propriety

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of an injunction in any court, territorial like state courts are the natural sources for the interpretation and application of the acts of their legislatures and equally of the propriety of interference by injunction. We think that where equitable interference with state and territorial acts is sought in federal courts, judicial consideration of acts of importance primarily to the people of a state or territory should, as a matter of discretion, be left by the federal courts to the courts of the legislating authority unless exceptional circumstances command a different course."

Appellants argue that the district court was prohibited from granting the injunctions by § 2283 of Title 28, relating to injunctions "to stay proceedings in a State court". As we said in Alesna v. Rice, supra, we find it unnecessary to consider this question here.

The rules expressed in Babcock v. Noh, supra, and in Alesna v. Rice, supra, required the district court to deny the injunctions prayed for. The judgments are reversed with directions to dismiss the suits.

BROOKS v. PENNSYLVANIA R. CO.
No. 199, Docket 21917.

United States Court of Appeals Second Circuit.

Argued March 13, 1951.

Decided March 28, 1951.

John R. Brooks brought an action against the Pennsylvania Railroad Company for misdelivery of goods shipped on a straight bill of lading issued by defendant. The United States District Court for the Southern District of New York, entered a summary judgment which dismissed the complaint and the plaintiff appealed. The Court of Appeals, Per Curiam, held that allegation in plaintiff's affidavit submitted in opposition to motion for summary judgment did not pose a genuine issue of material fact and was insufficient to prevent award of summary judgment against plaintiff.

Affirmed.

See, also, 91 F.Supp. 101.

1. Federal civil procedure ⇐2491

In action against railroad for alleged misdelivery of household goods transported under straight bill of lading issued by defendant and in which plaintiff was named as consignor and consignee, allegation in affidavit submitted in opposition to defendant's motion for summary judgment, that plaintiff's contract with defendant called for shipment of goods to specified place in foreign country rather than to place in United States to which defendant delivered the goods, do not pose a genuine issue of material fact and was insufficient to prevent award of summary judgment.

2. Carriers ⇐84

If plaintiff's contract with railroad for shipment of goods by railroad called for delivery at specified place in foreign country, but plaintiff authorized plaintiff's agent to take delivery of goods in United States, defendant was justified in delivering goods to plaintiff's agent in United States and could not be held liable for misdelivery of goods.

Reverend John R. Brooks, pro se.

Bleakley, Platt, Gilchrist & Walker, New York City, Dennis P. Donovan and Robert L. Conkling, New York City, of counsel, for appellee.

Before SWAN, CHASE and FRANK, Circuit Judges.

PER CURIAM.

Plaintiff appeals from a summary judgment which dismissed his complaint in an action against the Pennsylvania Railroad Company for alleged misdelivery of household goods transported under a straight bill of lading in which plaintiff was named as both consignor and consignee. Defendant moved for summary judgment on the grounds that (1) the uncontradicted evidence showed that proper delivery had been made; and that (2) the action was barred by *res judicata*. The lower court held that

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motion to annul, vacate and set aside his sentence and to direct his immediate release from prison.

There were nine counts in the indictment, all charging appellant's violation of section 338a, subdivision (a), of Title 18 United States Code [1948 Revised Criminal Code, 18 U.S.C.A. § 876], in wilfully with intent to extort money, threatening to injure, and knowingly and with intent to extort money depositing in the United States Post Office letters containing threats to injure the person of the addressee.

On motion of the United States Attorney, all counts of the indictment except the ninth count were dismissed. The defendant was found guilty on that count and was sentenced to fifteen years imprisonment. The only material issue before us is whether the single count upon which the conviction rested states an offense. It is clear that it does. Even without inclusion of the first numbered paragraph of the ninth count, the offense condemned is plainly charged, in that averment is made that the defendant "did, on or about the 3rd day of May, 1948, in the City of Canton, County of Stark, State and Northern District of Ohio, then and there knowingly and with intent to extort money from Joe Cohen deposit and cause to be deposited in a Post Office of the United States, to-wit, the Post Office at Canton, Ohio, to be sent and delivered by the Post Office establishment of the United States, a letter and communication postmarked Canton, Ohio, May 3, 1948, addressed to the said Joe Cohen and containing a threat to injure the person of the said addressee, * * * which letter and communication was then and there enclosed in a sealed envelope, postage prepaid, a true copy of which envelope is marked Exhibit "Q", attached hereto, and by reference made a part hereof; that a true copy of said letter and communication is marked Exhibit "R", attached hereto, and by reference made a part hereof; that said letter and communication was duly carried by the United States mail for delivery into the City and County of San Francisco, Southern Division of the Northern District of California, according to the direction thereon."

The exhibited letter plainly threatens injury to the addressee Joe Cohen, Elks Club, San Francisco, California, and evinces the manifest intent to extort money from the addressee.

The order of the district court denying the motion of appellant is affirmed.

CITY OF MIAMI v. SUTTON et al.
No. 13113.

United States Court of Appeals
Fifth Circuit.
April 25, 1950.

Durward B. Sutton and Sarah B. Sutton, doing business as the Sutton Jewelry Company brought suit against the City of Miami to enjoin enforcement of city ordinance which would have effect of preventing plaintiffs from holding proposed jewelry auctions between the hours of six in the evening and eight in the morning, on ground that ordinance, as applicable to them, violated provisions of the federal constitution, and for a declaratory decree. The United States District Court for the Southern District of Florida, John W. Holland, J., rendered a judgment for the plaintiffs, and the defendants appealed. The Court of Appeals, Russell, Circuit Judge, held that plaintiffs were not entitled to injunctive relief.

Judgment reversed with directions to dismiss.

1. Declaratory judgment ⇐128
Injunction ⇐85(2)

Those operating a jewelry store were not entitled to a declaratory judgment or to injunction from federal district court enjoining city from enforcing ordinance which would have effect of preventing them from holding proposed jewelry auctions at their establishd place of business between the hours of six in the evening and eight in the morning, on ground that ordinance, as applicable to them, violated provisions of the federal Constitution because they would be subject to multiple

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fines and imprisonments under the ordinance and would allegedly suffer damage to their reputations. U.S.C.A.Const. Amends. 4, 14.

2. Injunction ⇐105(1)

Equity courts do not ordinarily restrain criminal prosecutions.

3. Criminal law ⇐31

Immunity from prosecution in good faith for his alleged criminal acts is not accorded to any citizen or member of the community.

4. Injunction ⇐105(1)

The imminence of a criminal prosecution, even though alleged to be unauthorized and hence unlawful, is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.

5. Courts ⇐508(7)

The imminence of a criminal prosecution, even though alleged to be unauthorized and hence unlawful, is not alone ground for relief in a federal equity court particularly where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful.

6. Courts ⇐508(7)

The federal courts are without jurisdiction to try alleged criminal violation of state statutes.

7. Courts ⇐489(2)

The state courts are the final arbiters of the meaning and appropriate application of state statutes, subject only to review by the United States Supreme Court if such construction or application is appropriately challenged on constitutional grounds.

8. Courts ⇐508(7)

Interference with the process of the criminal law in state courts, in whose control they are lodged by the constitution, and the determination of questions of criminal liability under state law by federal equity courts can be justified only in most exceptional circumstances and upon clear showing that an injunction is necessary to prevent irreparable injury.

9. Courts ⇐508(7)

In the exercise of the sound discretion which guides the determination of federal equity courts, scrupulous regard must be had for the rightful independence of state governments, and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds.

10. Declaratory judgment ⇐387
Injunction ⇐105(2)

The restrictions on the propriety of the grant by a federal court of an injunction to restrain institution of prosecutions for violations of state or municipal penal laws are in no wise relaxed because application for an injunction may be presented along with a request for a declaratory decree.

11. Declaratory judgment ⇐128

Where issuance of an injunction was the only means by which a declaration of rights as to the constitutionality of city ordinance as applied to plaintiffs could effectively be enforced or bring about a termination of the controversy, the legal impossibility of obtaining such injunctive relief rendered a declaration advisory only and therefore futile to effectuate a settlement of the controversy.

John D. Marsh, Asst. City Atty., J. W. Watson, Jr., City Atty., Miami, Fla., for appellant.

George C. McCaughan, Miami, Fla., and Arthur A. Kimmel, Miami Beach, Fla., for appellees.

Morris Berick, Herbert S. Shapiro and Richard E. Gerstein, Miami Beach, Fla., for amicus curiae.

Before HUTCHESON, Chief Judge, and WALLER and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge.

The City of Miami, appellant here, and its officers, were each and all enjoined by order of the trial Court from enforcing the

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City's Ordinance No. 3535 against Durward B. Sutton and Sarah B. Sutton, doing business as Sutton Jewelry Company. By this appeal the City contends that the Court erred in exercising jurisdiction, in granting the injunction, and in denying the appellant's motion to dismiss. Under the facts of this case and the law properly applicable thereto, we sustain the contention that the Court erred in overruling the motion to dismiss, and in granting an injunction.

The complaint of the appellees, seeking a declaratory decree and injunctive relief, outlined what was denominated a "unique method of doing business and effecting sales" of jewelry and other related merchandise, which while it concededly has some of the features of a "public auction" sale is "materially different from such auction sales in important respects," these claimed differences in law and fact being fully stated.[1] It is alleged that the appellees had prepared for inaugurating the proposed method of sales by acquiring a substantial stock of articles, the disposal of which was prevented by the threat of a series of vexatious arrests, any one of which would irreparably damage the good reputation of the complainants which they had enjoyed in the community since 1925; and that the threatened and intended enforcement of the ordinance had injuriously restricted them in their business and resulted in a diminution of their profits.

A copy of Ordinance No. 3535 of the City of Miami, attached as an exhibit to the complaint, provides stringent regulations governing the sale and offer to sell of jewelry, watches and diamonds "at public auction" and requires the securing of a permit to conduct such auction; the furnishing of detailed reports of operations by permittees; and subjects violators to a fine of not exceeding $500.00 or imprisonment not to exceed 60 days, or both.[2] The complaint specifically concedes that fraud is likely to occur at auction sales of diamonds, jewelry and other like articles conducted after nightfall and by artificial light during the excitement of competitive bidding, when the high bid is final without opportunity for daylight inspection and examination. Indeed the selection and proposed adoption of "appellees' detailed method" is said to be prompted by the desire to eliminate the possibility of fraud or deception. Appellees set forth as the controversy between the parties their contention that the provisions of the ordinance, and particularly specified sections thereof, are not applicable to their proposed method of doing business, but if so, are violative of the provisions of Amendment 4 and Amendment 14 of the Constitution of the United States, whereas the City contends and asserts that the ordinance is applicable to appellee's detailed method of doing business, and the ordinance and all of its provision is constitutional. The officials of defendant have "threatened to arrest the plaintiffs and * * * all of their employees and charge each of them with a violation of the provisions of such ordinance if and when they should conduct their business * * * within the corporate limits of said defendant municipality between the hours of six in the evening of any day and eight in the morning of the following day, and if and when the plaintiffs employ in the conduct of their business the methods detailed hereinabove. * * *" The appellees prayed that the Court decree the provisions of the ordinance and the specific provisions re-

1. It is stated in the briefs that this proposed plan would in operation and legal effect be the same as that referred to and upheld in Zaconick [redacted] City of Hollywood, D.C., 85 F.Supp. 52, in which the contentions now urged were approved by the trial Court in the present case and the enforcement of an ordinance identical with Miami's #3535 enjoined. It is apparent that the plan of sales proposed to be adopted by the complainants is in substantial accord with the discussion and rulings of the Court there made.

2. A similar ordinance has been upheld by the Florida Courts. The opinion in Zaconick v. City of Hollywood, supra, [85 F.Supp. 55] recognizes that the Levy case (Levy [redacted] Stone), 97 Fla. 458, 121 So. 565, 566, held "a municipal ordinance similar (if not identical) in its terms to the ordinance here in question" was valid as applied to "'auction sales' at night of certain classes of merchandise."

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ferred to as not applicable to the plaintiffs and their proposed method of conduct of their business; or if the Court holds the provisions of such ordinance applicable to the plaintiffs and such methods, it declare and decree such ordinance unconstitutional and enjoin and restrain the municipality and its officers from enforcing or attempting to enforce the ordinance during the pendency of the cause or until the further order of the Court, and that upon the final hearing the injunction be made permanent.

Eight days after the filing of the complaint the municipality responded with a motion to dismiss on the grounds: that no federal question was involved; that there was no matter stated warranting injunctive relief; that the complainants had a complete and adequate remedy at law in the courts of the State of Florida; that there was no such showing of irreparable injury as would warrant the issuance of an injunction; and that the ordinance was valid and constitutional. On the same day the Court, after a hearing, granted an injunction upon terms and provisions as in the order set forth.[3] On January 16th, upon a further hearing, the motion to dismiss the complaint was ordered denied and the defendant granted twenty days within which to file its answer.

[1] The temporary injunction issued in this case had factual support only in the allegations of the complaint. There was in

3. "It is Ordered and Decreed herein as follows:

"1. That on the plaintiffs' compliance with the provisions of the paragraph hereof numbered 2, and the subject to the provisions of the paragraph hereof numbered 3, the defendant municipality, and each of its officers, agents, servants and employes be, and they hereby are, enjoined and restrained until the further order of the Court, from enforcing or attempting to enforce against the plaintiffs any of the provisions of that certain ordinance of the defendant municipality, to-wit: Ordinance #3535, dated April 7, 1948.

"2. That the plaintiffs be, and they hereby are, required to file herein a good and sufficient bond in the penal sum of $1000.00 with good and sufficient surety or sureties, payable to the defendant, and conditioned that the plaintiff will pay, or cause to be paid, to the defendant, if and in the event the plaintiffs' application for this injunctive order shall be later held to have been wrongful, all costs, damages and expenses (including reasonable attorney's fees) which the defendant shall pay or incur and which shall result from, or be occasioned by, such wrongful application; and the injunctive provisions of the paragraph hereof numbered 1, shall not become or be effective unless and until the plaintiffs have filed, and the Clerk of this Court shall have approved such bonds.

"3. That the plaintiffs be, and they hereby are, required to conduct and operate their business (the nature and character of which are set forth in their complaint) in strict accordance with the methods outlined and detailed in such complaint, and that they be, and they hereby are, further required (a) to inform and advise all prospective or potential purchasers, prior to offering any article for sale, of the conditions or provisions subject to which any proposal to buy such article is to be accepted by the plaintiffs; (b) to prominently display, at all times, in their place of business a notice or bulletin in and by which prospective or potential purchasers shall be effectively and adequately informed and advised of the plaintiffs' methods of doing business (as outlined and detailed in their complaint); and (c) to furnish and deliver to each prospective or potential purchaser, whose conditional or provisional proposal to buy any article, offered for sale by the plaintiffs shall have been accepted by him, a written or printed memorandum in and by which the plaintiffs shall legally and effectively bind themselves contractually to refund to him or her the full amount of the purchase price of such article conditionally and provisionally paid to or deposited with the plaintiffs by such prospective or potential purchaser if and in the event he or she, at any time within thirty days after the submission of such conditional or provisional proposal, with or without the assignment of any reason or excuse for doing so, shall redeliver such article, in the same condition it was in at the time of the delivery to such prospective or potential purchaser, to the plaintiffs and request such refund; and the applicability and effectiveness of the injunctive provisions of the paragraph hereof number 1, are dependent and conditioned on strict compliance by the plaintiffs with the provisions of this paragraph."

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opposition the defendant's motion to dismiss. While for the purposes of the motion to dismiss, the factual allegations of the complaint may be taken as true, this is nevertheless not the preferable foundation for the issuance of an injunction against the institution of a prosecution for violation of a municipal ordinance. Regardless of this, however, the facts which may be considered as thus established are insufficient to authorize the issuance of an injunction. The complaint fails to show "the imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which [the complainant] would sustain if those threats were carried out." Watson [redacted] Buck, 313 U.S. 387, 61 S.Ct. 962, 966, 85 L.Ed. 1416. Particularly here there is and can be no showing of irreparable injury, for there is not even a claim of injury to complainants' established and going business, but merely a claim that the hazards posed by the contemplated enforcement of the ordinance prevents complainants from embarking upon a new enterprise, from trying out, it may be said, their proposed unique method of merchandising. The only loss which the complainants could sustain is speculative, dependent upon what, if any, profits they might make if they are permitted to begin and carry on the conduct of their sales in the manner which they assert is legal. They are not disturbed in any feature of their business dealings which they allege they have conducted since 1925. Since there is no danger to their already established business, but merely apprehension of punishment for, and prospective loss of profits in being prevented from, carrying on their proposed new method of sale, the question of apprehended multiple prosecutions could only arise upon continued and persistent engagement in the new business in disregard of the adjudications by the municipal or state courts in which the question of the legality of the proposed business should properly be made. It is true that they are confronted with the necessity of determination of whether their proposed business operations fall within the regulations of the ordinance, but the situation is no different from numerous instances in the law "where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death;" Nash [redacted] United States, 229 U.S. 373, 377, 33 S.Ct. 780, 781, 57 L.Ed. 1232. The complaint presents no ground authorizing the issuance of an injunction to prevent multiple prosecutions.

[2-9] The law applicable to the situation here is clearly stated in Beal [redacted] Missouri Pacific R. Corp. 312 U.S. 45, 61 S.Ct. 418, 420, 85 L.Ed. 577, as follows:

"It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. In re Sawyer, 124 U.S. 200, 211, 8 S.Ct. 482, 488, 31 L.Ed. 402; [redacted] & Farnum Mfg. Co. [redacted] City of Los Angeles, 189 U.S. 207, 23 S.Ct. 498, 47 L.Ed. 778; Hygrade Provision Co. [redacted] Sherman, 266 U.S. 497, 500, 45 S.Ct. 141, 69 L.Ed. 402. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. Terrace [redacted] Thompson, 263 [redacted] 197, 214, 44 S.Ct. 15, 17, 68 L.Ed. 255; Packard [redacted] Banton, 264 U.S. 140, 143, 44 S.Ct. 257, 258, 68 L.Ed. 596; Tyson & Bro. United Theatre Ticket Offices [redacted] Banton, 273 U.S. 418, 428, 47 S.Ct. 426, 427, 71 L.Ed. 718, 58 A.L.R. 1236; Cline [redacted] Frink Dairy Co., 274 U.S. 445, 452, 47 S.Ct. 681, 682, 71 L.Ed. 1146.

"This is especially the case where the only threatened action is the prosecution in the state courts by state officers of an alleged violation of state law, with the resulting final and authoritative determination of the disputed question whether the act complained of is lawful or unlawful. Harkrader [redacted] Wadley, 172 U.S. 148, 19 S.Ct. 119, 43 L.Ed. 399; Spielman Motor Sales Co. [redacted] Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322. The federal courts are without jurisdiction to try alleged criminal

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violations of state statutes. The state courts are the final arbiters of their meaning and appropriate application, subject only to review by this Court if such construction or application is appropriately challenged on constitutional grounds. Hygrade Provision Co. [redacted] Sherman, supra; Fenner [redacted] Boykin, 271 [redacted] 240, 46 S.Ct. 492, 70 L.Ed. 927.

"Hence interference with the processes of the criminal law in state courts, in whose control they are lodged by the Constitution, and the determination of questions of criminal liability under state law by federal courts of equity can be justified only in most exceptional circumstances, and upon clear showing that an injunction is necessary in order to prevent irreparable injury. Cf. Hygrade Provision Co. [redacted] Sherman, supra; Cline [redacted] Frink Dairy Co., supra; Spielman Motor Sales Co. [redacted] Dodge, supra. And in the exercise of the sound discretion, which guides the determination of courts of equity, scrupulous regard must be had for the rightful independence of state governments and a remedy infringing that independence which might otherwise be given should be withheld if sought on slight or inconsequential grounds. Di Giovanni v. Camden Fire Insurance Ass'n, 296 U.S. 64, 73, 56 S.Ct. 1, 5, 80 L.Ed. 47, and cases cited." See also, Watson [redacted] Buck, supra.

These principles are even more applicable here where there is no substantial contention that the City Ordinance, when applied to the subject matter which it purports to encompass, is unconstitutional as such, but only becomes so when applied to the complainants in the conduct of their proposed business. Nevertheless, under these circumstances, appellees were granted by the issuance of the injunction, in effect, a determination that the manner and method presented to the Court as a proposed plan of operation in the future was not within the terms of the ordinance, and therefore that the municipality would not be permitted to test the actual manner of the conduct of the complainants' business (which of course could be determinable only after it had been begun). Consequently determination of what practice or means of operation would result in a violation of the ordinance was in effect removed from the jurisdiction and control of the municipal or state courts, and opportunity for determination of the legality of actual operation restricted solely to such rights as the city might secure by presentation to the Court of the matter of noncompliance with the Court's order by a request for modification of the restraining order. Thereby jurisdiction of the violation of the ordinance was, for all practical purposes, removed from the municipal or state courts to the federal court, but with the appellees left immune from any penalty for violation of the City Ordinance; and in case of any violation of the restrictions of the decree, only subject to the loss of the protection the decree provided when and if the city might secure a dissolution of the injunction.

[10] The restrictions upon the propriety of the grant by a federal court of an injunction to restrain the institution of prosecutions for violations of state or municipal penal laws are in nowise relaxed because the application for an injunction may be presented to the Court along with a request for a declaratory decree.

[11] Since the issuance of an injunction is the only means by which any declaration of rights could effectively be enforced or bring about a termination of the controversy, the legal impossibility of obtaining such injunctive relief renders a declaration advisory only and therefore futile to effectuate a settlement of the controversy. The opinion and decree of the federal court would not be *res adjudicata* in any subsequent criminal proceeding in the municipal or state court, and the matter of the acceptance of the federal court's declaration would be at last left solely to the voluntary determination of the municipal authorities.

The interlocutory injunction was erroneously granted. The complaint should have been dismissed. The judgments are reversed with directions to dismiss it.

Reversed.

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Westlaw.

137 F.2d 71
(Cite as: 137 F.2d 71)

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SPENCE [redacted]. COLE
C.A.4 1943.

Circuit Court of Appeals, Fourth Circuit.
SPENCE, Chief of Police,
[redacted]
COLE et al.
No. 5082.

July 14, 1943.

5. Courts 508(7) The arrest by federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by federal court of equity, are to be supported only on a showing of danger of irreparable injury both great and immediate.

Appeal from the District Court of the United States for the Eastern District of North Carolina, at Elizabeth City; Isaac M. Meekins, Judge.

Action by Andrew E. Cole, A. K. Smith and Everett B. Costner against Walter W. Spence, Chief of Police of Elizabeth City, N.C., to enjoin the defendant from arresting or interfering with plaintiffs in preaching the gospel or in distributing booklets, tracts and pamphlets used by them for the purpose of stimulating private Bible study. From a judgment for plaintiffs, the defendant appeals.

Reversed.
West Headnotes
[1] Courts 106 ⚿508(7)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(2) Restraining Particular Proceedings
106k508(7) k. Criminal Proceedings. Most Cited Cases
That enforcement of ordinance against plaintiffs would constitute a violation of their constitutional rights did not entitle plaintiffs to an injunction where there was no showing of such irreparable injury as would warrant a court of equity in restraining criminal prosecutions and there was no reason to think that state courts would not protect constitutional rights of plaintiffs upon such prosecutions being instituted.

[2] Injunction [redacted] ⚿105(1)

[redacted] Injunction
212II Subjects of Protection and Relief
212II(H) Matters Relating to Criminal Acts
212k105 Criminal Prosecutions
212k105(1) k. In General. Most Cited Cases
Courts of equity do not ordinarily restrain criminal prosecutions.

[3] Injunction [redacted] ⚿105(2)

[redacted] Injunction
212II Subjects of Protection and Relief
212II(H) Matters Relating to Criminal Acts
212k105 Criminal Prosecutions
212k105(2) k. Invalidity of Statute or Ordinance. Most Cited Cases
No person is immune from prosecution in good faith for his alleged criminal acts, and imminence of prosecution though alleged to be in violation of constitutional guaranties is not a ground for equity relief, since lawfulness or constitutionality of a statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction.

[4] Courts 106 ⚿508(7)

106 Courts
106VII Concurrent and Conflicting Jurisdiction

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137 F.2d 71
(Cite as: 137 F.2d 71)

106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(2) Restraining Particular Proceedings
106k508(7) k. Criminal Proceedings. Most Cited Cases
Where a threatened prosecution is by state officers for alleged violation of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by Supreme Court of United States on federal grounds appropriately asserted.

[5] Courts 106 ⇐508(7)

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(2) Restraining Particular Proceedings
106k508(7) k. Criminal Proceedings. Most Cited Cases
The arrest by federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by federal court of equity, are to be supported only on a showing of danger of irreparable injury both great and immediate.

[6] Declaratory Judgment 118A ⇐5.1

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(A) In General
118Ak5 Discretion of Court
118Ak5.1 k. In General. Most Cited Cases
(Formerly 118Ak5, 13k6)
The granting of a declaratory judgment is a matter resting in the sound discretion of the court.

[7] Declaratory Judgment 118A ⇐84

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(A) Rights in General
118Ak84 k. Criminal Laws. Most Cited Cases
(Formerly 13k6)
The discretion to grant a declaratory judgment ought not to be exercised where its only effect would be to decide matters which could be better decided in the criminal courts of the state in pending actions involving identical questions as to which a declaratory judgment is asked.

***72** John H. [redacted] of Elizabeth City, N.C. (J. W. Jennette, of Elizabeth City, N.C., on the brief), for appellant.
Hayden C. Covington, of Brooklyn, N.Y., for appellees.

Before PARKER, SOPER, and NORTHCOTT, Circuit Judges.
PER CURIAM.
This is an appeal from a decree enjoining the Chief of Police of Elizabeth City, N.C., from arresting or interfering with plaintiffs in preaching the Gospel or in distributing booklets, tracts and pamphlets used by them for the purpose of stimulating private Bible study. Plaintiffs are members of the sect known as Jehovah's Witnesses. They were threatened with prosecution by defendant for violating an ordinance of Elizabeth City which declared it to be a nuisance for solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise to go in or upon private residences or premises, without the request or invitation of the owners or occupants, for the purpose of soliciting orders for goods, wares and merchandise or peddling, hawking or disposing of same. The evidence showed that plaintiffs had been going from house to house in the city distributing the pamphlets of their sect and seeking to collect a small sum of money therefor. The judge below held that their activities did not constitute a violation of the ordinance, but that defendant was attempting to enforce it against them in such way as to violate their constitutional rights. The injunction granted did not enjoin the prosecution of criminal cases already pending in which plaintiffs were being prosecuted for violation of the ordinance, but restrained future prosecutions.

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[1][2][3][4][5] We may assure that the enforcement of the ordinance against plaintiffs under the circumstances here disclosed would constitute a violation of their constitutional rights. Murdock [redacted]. Commonwealth of Pennsylvania, 63 S.Ct. 870, 87 L.Ed. . . . . But it does not follow that plaintiffs are entitled to the injunction granted them below. There was no showing of such irreparable injury as would warrant a court of equity in restraining criminal prosecutions; and there is no reason to think that the state courts would not protect the constitutional rights of plaintiffs upon such prosecutions being instituted.***73** The case is clearly one for the application of the rule laid down by the Supreme Court in Douglas [redacted] City of Jeannette, 63 S.Ct. 877, 881, 87 L.Ed. . . . , as follows: 'It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. [redacted] & Farnum Mfg. Co. [redacted]. City of Los Angeles, 189 U.S. 207, 23 S.Ct. 498, 47 L.Ed. 778;Fenner [redacted]. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927. Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' Spielman Motor Sales Co. [redacted]. Dodge, 295 U.S. 89, 95, 55 S.Ct. 678, 680, 79 L.Ed. 1322, and cases cited; Beal [redacted]. Missouri Pac. R. Corp., 312 U.S. 45, 49, 61 S.Ct. 418, 420, 85 L.Ed. 577; and cases cited; Watson [redacted]. Buck, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416;Williams [redacted]. [redacted], 317 U.S. 599, 63 S.Ct. 258, 87 L.Ed. . . . .'

[6][7] We are asked to hold that plaintiffs are entitled to a declaratory judgment establishing their rights. The granting of a declaratory judgment, however, is a matter resting in the sound discretion of the court (Aetna Casualty & Surety Co. [redacted]. Quarles, 4 Cir., 92 F.2d 321); and it is clear that the discretion ought not be exercised in a case of this character where its only effect would be to decide matters, as pointed out in the quotation above, which could be better decided in the criminal courts of the state. This is particularly true in view of the fact that criminal actions are pending against plaintiffs in the state courts involving the identical questions as to which plaintiffs ask a declaratory judgment. See Borchard Declaratory Judgments 2d ed. pp. 312, 653, 1022; Aetna Casualty & Surety Co. [redacted]. Quarles, supra.

The decree appealed from will accordingly be reversed.

Reversed.

C.A.4 1943.
Spence [redacted]. Cole
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259 F. 525, 170 C.C.A. 487
(Cite as: 259 F. 525)

H
JACOB HOFFMAN BREWING CO. [redacted].
M'ELLIGOTT
C.A.2 1919.

Circuit Court of Appeals, Second Circuit.
JACOB HOFFMAN BREWING CO.
v.
McELLIGOTT, Deputy Internal Revenue Collector, et al. CLAUSEN-FLANAGAN BREWERY [redacted].
SAME. RUPPERT [redacted]. SAME.
June 28, 1919.

Rogers and Hough, Circuit Judges, dissenting in part.

Three suits, by the Jacob Hoffman Brewing Company, by the Clausen-Flanagan Brewery, and by Jacob Ruppert, a corporation, respectively, against Richard J. McElligott, Acting and Deputy Collector of Internal Revenue, and Francis G. Caffey, United States Attorney for the Southern District of New York. From orders granting preliminary injunctions (259 Fed. 321), the defendants appeal. Affirmed as modified.
West Headnotes
Indictment and Information 210 ⇦28

210 Indictment and Information
210III Formal Requisites of Indictment
210k27 Commencement
210k28 k. In General. Most Cited Cases
A criminal suit in the federal courts must be brought in the name of the United States and by the United States attorney.

Injunction [redacted] ⇦75

[redacted] Injunction
212II Subjects of Protection and Relief
212II(E) Public Officers and Entities
212k75 k. State or National Boards and Officers. Most Cited Cases
Where the Internal Revenue Department refused to license or sell revenue stamps to concerns which it claimed were violating the War-Time Prohibition Act of November 21, 1918, 40 Stat. 1046, but this refusal was later abandoned, *held* that an acting deputy collector may be enjoined from reverting to the original practice of the department.

Injunction 212 ⇦105(1)

[redacted] Injunction
212II Subjects of Protection and Relief
212II(H) Matters Relating to Criminal Acts
212k105 Criminal Prosecutions
212k105(1) k. In General. Most Cited Cases
A federal district attorney cannot be enjoined from instituting criminal proceedings under the War-Time Prohibition Act of November 21, 1918, 40 Stat. 1046, against concerns manufacturing and selling nonintoxicating beer, upon the ground that the attorney had transcended his authority by invoking the act against nonintoxicating liquors.

Intoxicating Liquors 223 ⇦134

223 Intoxicating Liquors
223VI Offenses
223k133 Liquors Prohibited
223k134 k. Description and Properties. Most Cited Cases
The War-Time Prohibition Act of November 21, 1918, 40 Stat. 1046, preventing the manufacture and sale of beer, wine and other intoxicating liquors, etc., refers only to beer and wine which is in fact intoxicating.

United States 393 ⇦125(3)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(3) k. Necessity of Waiver or Consent. Most Cited Cases

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United States can only be sued by own consent.

United States 393 ⇦125(28.1)

393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(28) Particular Departments, Officers, or Agencies, Suits Against
393k125(28.1) k. In General. Most Cited Cases
(Formerly 393k125(28))
A suit to enjoin a United States attorney from instituting criminal proceedings under a federal statute is a suit against the United States, which cannot be maintained unless property rights are threatened with irreparable damage, and the statute is either unconstitutional or the attorney is transcending his authority under a valid statute.

***525** Francis G. Caffey, U.S. Atty., of New York City (William C. Fitts. Vincent H. Rothwell, and Cornelius J. Smyth, all of New York City, of counsel), for appellants.
Root, Clark, Buckner & Howland, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Jacob Hoffman Brewing Co.
Guggenheimer, Untermyer & Marshall, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Clausen-Flanagan Brewery.
***526** Fitch & Grant, of New York City (Elihu Root and William D. Guthrie, both of New York City, of counsel), for appellee Jacob Ruppert.

Before WARD, ROGERS, and HOUGH, Circuit Judges.
WARD, Circuit Judge.
These three cases involve the same question, and in each the appeal is from an order of the District Court of the United States for the Southern District of New York restraining, pending final hearing, the defendant McElligott, Acting and Deputy Collector of Internal Revenue of the Third District of New York, from refusing to issue licenses to the complainants as brewers of beer, or to issue revenue stamps in respect to their beer, provided they pay or duly tender the taxes required by law, and restraining the defendant Caffey, United States Attorney for the Southern District of New York, from arresting or prosecuting the complainants, their officers, agents, servants, etc., or from enforcing forfeiture of their property for failure to affix revenue stamps to their barrels of beer when such failure is due to the refusal of the defendant McElligott to issue the same, and from enforcing the pains and penalties of the act of November 21, 1918, c. [redacted] 40 Stat. 1046, by arresting or prosecuting the complainants, their officers, agents, etc.

The complainants are brewers of beer made from malt with an alcoholic content not exceeding 2.75 per cent. by weight, and the rights of the parties in connection with the orders appealed from depend upon the act of Congress of November 21, 1918, the relevant portions of which are:

'That after June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the army and navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May 1, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June 30, 1919, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby

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authorized and directed to prescribe rules and regulations subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June 30, 1919, until this act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale, and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this act no distilled, malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization: Provided, that this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act.

***527** 'Any person who violates any of the foregoing provisions shall be punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both such imprisonment and fine. * * * c

Originally the Internal Revenue Department took the position that after May 1, 1919, it would not license brewers who manufactured beer with an alcoholic content equaling or exceeding one-half of 1 per cent. by volume, nor sell the revenue stamps to be affixed to barrels of such beer; but afterwards, by advice of the Attorney-General, this position was abandoned, and the department consented to license brewers and to sell them revenue stamps, even if their beer did contain an alcoholic content equaling or exceeding one-half of 1 per cent. by volume. Accordingly the complainants are not now subject to any forfeiture or penalty under the internal revenue acts if they pay the taxes required by law. The only risk they are exposed to if they continue to brew beer of an alcoholic content not exceeding 2.75 per cent. by weight is that of imprisonment for not more than one year, or a fine not exceeding $1,000, or both, if such manufacture be found to be a violation of the act of November 21, 1918. Nevertheless the injunction against the acting deputy collector, defendant, can do no harm, and, in view of the position originally taken by the Internal Revenue Department, it may go against him.

In this case we have not to inquire whether an administrative board is acting without or beyond its jurisdiction (Gegiow [redacted] Uhl, 239 U.S. 3, 36 Sup.Ct. 2, 60 L.Ed. 114), or to deal with any attack upon or interference with the complainants' property (United States [redacted] Lee, 106 U.S. 196, 1 Sup.Ct. 240, 27 L.Ed. 171), or of confiscation of it, as in the Rate Cases.

It is perfectly well settled that the United States may not be sued, except upon its own consent. Such consent it has given by various statutes which do not apply to the case under consideration. There is no difference between the states and the United States in respect to this immunity from suit. It is an attribute of every sovereign, recognized by all sovereigns. A criminal suit in the federal courts must be brought in the name of the United States, and can only be brought by the United States attorney. Confiscation Cases, 7 Wall 454, 457, 19 L.Ed. 196. A suit in equity to enjoin the United States attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. In such a case the United States is sued as effectively as if it were a defendant by name. There is, however, a well-recognized exception to the rule, viz. if property rights are invaded, and the statute in question is unconstitutional, it is void, is to be treated as nonexistent, and so no defense to the United States attorney. When instituting criminal proceedings under it he is to be regarded not as representing the United States in his official capacity, but as acting individually. So if, under a valid statute, he threatens to proceed in a manner injurious to complainant's property rights, and not authorized by the statute, he transcends his authority, does not represent the United States, is not protected by the statute, and may be enjoined. Irreparable injury alone is not enough. Both these conditions must exist. Obviously ***528** in such cases the constitutionality of the statute, or the question whether the United States attorney has transcended his authority, must be determined by the court before it can determine whether the particular suit is or is not against the United States. Mr. Justice Peckham said in Ex parte Young, 209 U.S. 123, 159, 28 Sup.Ct. 441, 453 (52 L.Ed. 714, 13 L.R.A.(N.S.) 932, 14 Ann.Cas. 764):

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'It is also argued that the only proceeding which the Attorney General could take to enforce the statute, so far as his office is concerned, was one by mandamus, which would be commenced by the state in its sovereign and governmental character, and that the right to bring such action is a necessary attribute of a sovereign government. It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer to whose discretion is confided the use of the name of the state of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion, and cannot be controlled by any court.

'The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional.
If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States. See In re Ayers, supra (123 U.S.)p. 507 (8 Sup.Ct. 164, 31 L.Ed. 216). It would be an injury to complainant to harass it with a multiplicity of suits or litigation generally in an endeavor to enforce penalties under an unconstitutional enactment, and to prevent it ought to be within the jurisdiction of a court of equity. If the question of unconstitutionality with reference, at least, to the federal Constitution, be first raised in a federal court, that court, as we think is shown by the authorities cited hereafter, has the right to decide it, to the exclusion of all other courts. '

The act of November 21, 1918, is a war measure, constitutional as such, and by its express terms is to continue in force until a time which has not yet been reached, i.e., the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States.
Until such time it is the duty of the United States attorney, defendant, under section 771, United States Revised Statutes (Comp. St. Sec. 1296), to prosecute all delinquents for crimes and offenses covered by it.

The sole ground upon which the United States attorney, defendant in this case, is charged with transcending his authority is that he erroneously construes the statute in connection with the complainant's product, viz. as prohibiting the use of food products in the manufacture of any beer for beverage purposes after May 1, 1919, and the sale of such beer after June 30, 1919; whereas, the act, properly construed, prohibits only the manufacture and sale of such beer as is intoxicating, which the complainants' beer, containing not more than 2.75 per cent. of alcohol by weight, is not.

***529** Although we concur in the construction of the statute by the court below, and assume that the United States attorney will institute criminal proceedings, we do not think the court had power to stay him by injunction from doing so. The proper place for determining whether such criminal proceedings are maintainable is not in a court of equity, but upon an indictment tried in a criminal court before a jury. For any error then committed there will be an adequate remedy by writ of error.
We recognize the importance of the interests at stake; that the complainants and others in like case, if not content to manufacture beer containing an alcoholic content not equaling or exceeding one-half of 1 per cent. by volume, must choose between discontinuing their business or carrying it on at the risk of punishment under the act of November 21, 1918, if they continue after May 1, 1919, to manufacture, and after June 30, 1919, to sell, beer containing not more than 2.75 per cent. of

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alcohol by weight. The question, however, is not one of convenience or of discretion, but of the power of the court; and we think such an extension of judicial power, to meet what seems to be a hard case, to the domain of the executive department and of the courts of common law, would be an injury to our system of jurisprudence still more serious.

This precise question was decided in accordance with these views by the Circuit Court of Appeals for the Sixth Circuit in Arbuckle [redacted] Blackburn, 113 Fed. 616, 51 C.C.A. 122, 65 L.R.A. 864. Judge Day, who as Justice Day wrote the opinion in the Hammer Case, 247 U.S. 251, 38 Sup.Ct. 529, 62 L.Ed. 1101, Ann. Cas. 1918E, 724, greatly relied upon by the complainants, and to be presently considered, said:

'We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indirectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve. Suess [redacted] Noble (C.C.) 31 Fed. 855;***530**Hemsley [redacted] Myers (C.C.) 45 Fed. 283;Kramer [redacted] Board, 53 N.Y.Super.Ct. 492; Food Co. [redacted]. McNeal, 1 Ohio, N.P. 266.'

District Judge Grubb in Central Consumers Co. [redacted]. Austin, 238 Fed. 616, arrived at the same conclusion. It is said that these cases are inconsistent with the decision in Ex parte Young, supra. In that case the defendant Young, Attorney General of Minnesota, had been enjoined by the Circuit Court of the United States from enforcing an act of the state of Minnesota fixing the charges for freight transportation at rates found to be confiscatory. After this order was entered in the federal court the Attorney General, in direct defiance of it, applied to a state court for a writ of mandamus compelling the railroad company to comply with certain provisions of the state act. For this he was adjudged by the Circuit Court to be in contempt, and put in custody of the United States marshal. Thereupon he applied to the Supreme Court for leave to file a petition for writs of habeas corpus and certiorari, which the court denied. The act was held to be unconstitutional because, among other reasons, it had been found by the lower court to be confiscatory of the railroad company's property. The general rule that courts of equity have no jurisdiction to enjoin criminal proceedings was fully recognized, but the injunction was sustained because of certain exceptions to the general rule within which that case fell. Mr. Justice Peckham said, at page 161 of 209 U.S., at page 454 of 28 Sup. Ct. (52 L.Ed. 714, 13 L.R.A.(N.S.) 932, 14 Ann.Cas. 764):

'It is further objected (and the objection really forms part of the contention that the state cannot be sued) that a court of equity has no jurisdiction to

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enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. Prout [redacted] Starr, 188 U.S. 537, 544 (23 Sup.Ct. 398, 47 L.Ed. 584). But the federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. Taylor [redacted]. Taintor, 16 Wall. 366, 370 (21 L.Ed. 287); Harkrader [redacted] Wadley, 172 U.S. 148 (19 Sup.Ct. 119, 43 L.Ed. 399).

'Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. [redacted] etc., Co. [redacted] Los Angeles, 189 U.S. 207 (23 Sup.Ct. 498, 47 L.Ed. 778). In Debbins [redacted] Los Angeles, 195 U.S. 223-241 (25 Sup.Ct. 18, 49 L.Ed. 169), it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.'Smyth [redacted] Ames (169 U.S. 466, 18 Sup.Ct. 418, 42 L.Ed. 819), supra, distinctly enjoined the proceedings in indictment to compel obedience to the rate act.

'These cases show that a court of equity is not always precluded from granting an injunction to stay proceedings in criminal cases, and we have no doubt the principle applies in a case such as the present. In re Sawyer, 124 U.S. 200, 211 (8 Sup.Ct. 482, 31 L.Ed. 402), is not to the contrary. That case holds that in general a court of equity has no jurisdiction of a bill to stay criminal proceedings, but it expressly states an exception, 'unless they are instituted by a party to the suit already pending before it and to try the same right that ***531** is in issue there.' Various authorities are cited to sustain the exception. The criminal proceedings here that could be commenced by the state authorities would be under the statutes relating to passenger or freight rates, and their validity is the very question involved in the suit in the United States Circuit Court. The right to restrain proceedings by mandamus is based upon the same foundation and governed by the same principles.'

The case under consideration does not fall within any of these exceptions. See, also, [redacted] [redacted] Los Angeles, 189 U.S. 207, 23 Sup.Ct. 498, 47 L.Ed. 778.

Only two cases are referred to in which United States attorneys have been enjoined, and the complainants rely upon them as showing that this question of jurisdiction was disregarded. Wilson [redacted]. New, 243 U.S. 332, 37 Sup.Ct. 298, 61 L.Ed. 755, L.R.A. 1917E, 938, Ann. Cas. 1918A, 1024, and Hammer [redacted] Dagenhard, 247 U.S. 251, 38 Sup.Ct. 529, 62 L.Ed. 1101, Ann. Cas. 1918E, 724. In them, as in the case under consideration, only injunctive relief was prayed for. The moment that relief was granted or denied the suit was at an end. The only difference is that, the decree in the two cases cited being final, an appeal lay directly to the Supreme Court (section 238, Judicial Code, Act March 3, 1911, c. 231, 36 Stat. 1157 (Comp. St. Sec. 1215)), whereas in this case, the order being interlocutory, appeal lay only to the Circuit Court of Appeals (section 129, Judicial Code (Comp. St. Sec. 1121)). It is said that because the Supreme Court disposed of the two cases cited it actually exercised the jurisdiction which the complainants deny the court in this suit has. Jurisdiction as a federal court is plain in all three cases, but this does not prove that a suit against the United States can be maintained either by consent of the parties or of the court or by oversight of either or both. The right to maintain the suits, i.e., to give the injunctive relief prayed for, could not be determined until the court had ascertained whether they fell within the general rule or within the exception. In Wilson [redacted]. New the moment the court found the act constitutional, from proceeding under which the United States attorney had been enjoined, the suit was necessarily found to be one against the United States, and the injunction improper, without any reference to the property

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rights involved. So in Hammer [redacted] Dagenhard, the moment the statute was found to be unconstitutional, and the complainant's right to employment directly invaded by its enforcement, the suit was necessarily found not to be against the United States, and the injunction was proper within the well-established exception. The decisions in these cases do not impair the general rule as to suits against the United States, or extend the exception to that rule. The whole attention of the court was directed to the vital question of constitutionality, and the fact that it did not restate well-established law does not convince us that it intended to depart therefrom.

We are sure that the United States attorney will co-operate with the complainants to have the question involved determined as speedily, and in the meantime with as little interference with their business, as possible.

Because the suit, so far as the defendant Caffey, United States attorney, is concerned, is against the United States, and there is no ***532** direct injury to the complainants' property rights, and the act of Congress under which it is charged he is threatening to proceed is constitutional, and in so proceeding he will not transcend his authority under the act, the order of the court below is modified by striking out the injunction pendente lite against him, and as so modified is affirmed.

ROGERS, Circuit Judge (dissenting in part). I concur in the foregoing opinion in so far as it holds that the injunction cannot issue to restrain the United States attorney from instituting criminal prosecutions under the acts of Congress approved August 10, 1917, c. 53, 40 Stat. 276 (Comp. St. 1918, Secs. 3115 1/8e to 3115 1/8r), and November 21, 1918. The importance of this case to the government and to the complainants, and the fundamental principle which is involved and which goes to the jurisdiction of the equity courts, makes it my duty to state the reasons upon which my conclusion is based.

The learned District Judge has rendered an opinion in which he has denied a motion to dismiss the bill of complainant, and a preliminary injunction has accordingly been issued restraining the United States attorney and the acting and deputy collector of internal revenue of the Third district of New York from enforcing, pending final hearing, certain acts of Congress. It seems to me that the rulings made are contrary to the powers of a court of equity, and are due to a misapprehension of certain decisions of the Supreme Court of the United States.

The court of chancery was founded on the inefficiency of the ordinary tribunals to do complete justice in civil matters. Almost at the same time and for a like reason the court of star chamber was established, and both had their origin in the royal prerogative. The star chamber grew out of the failure of the ordinary tribunals to do complete justice in criminal matters and other offenses of an extraordinary and dangerous character, and its jurisdiction was confined to cases partaking of a criminal character. Select Essays in Anglo-american Legal History, vol. 2, pp. 251, 252. We accordingly find it laid down with unanimity by the text-writers that criminal proceedings are not enjoined in equity.

In Pomeroy's Equity Jurisprudence (sec. 1361, p. 396, note) that distinguished authority states that ' criminal proceedings will never be enjoined'; citing Kerr [redacted] Corporation of Preston, L.R. 6 Ch.Div. 463; Saule [redacted] Browne, Id. 10 Ch.Div. 64; Portis [redacted] Fall, 34 Ark. 375;Phillips [redacted] Stone Mt., 61 Ga. 386. This accords with the general principle that when a cause belongs to the jurisdiction of the law courts equity will never interfere to restrain the prosecution of the action nor to stay proceedings on the judgment or execution upon mere legal grounds.

In Bispham's Equity (8th Ed., Sec. 424) it is laid down that 'proceedings in criminal courts will not be interfered with by injunction unless the proceedings are commenced by a person who is also plaintiff in equity relative to the same matter.' The author notes no other exception. The exception to which he refers comes under the right of ***533** the equity court to control the conduct of parties who seek its aid in furtherance of their civil rights. The defendant in the bill and in the criminal proceeding must be the same person, and the question raised and the object sought in the two

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proceedings must be identical.

In Maitland's Equity (page 261) that distinguished legal scholar says:

'A civil court, again, must not prohibit a man from instituting criminal proceedings.'

In Story's Equity Jurisprudence (section 893) the law is stated as follows:

'There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters or in any cases not strictly of a civil nature. As, for instance, they will not grant an injunction to stay proceedings on a mandamus, or an indictment, or an information, or a writ of prohibition. But this restriction applies only to cases where the parties, seeking redress by such proceedings, are not the plaintiffs in equity; for, if they are, the court possesses power to restrain them personally from proceeding, at the same time upon the same matter of right, for redress in the form of a civil suit and of a criminal prosecution. In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights. '

In Eden on Injunctions, 66, it is said:

'It is an established rule that an injunction, or any order in the nature of an injunction, will not be granted to restrain proceedings in a criminal matter.'

In Kerr on Injunctions (4th Ed.p. 7), the leading English authority on the subject, it is said:

'The court will not interfere by injunction in matters merely criminal or immoral, which do not affect any right to property. But if an act which is criminal touches also the enjoyment of property, the court has jurisdiction, but its interference is founded solely on the ground of injury to property.'

In High on Injunctions (section 68, 4th Ed.) it is laid down that-

'since courts of equity deal only with civil and property rights, they will not interfere by injunction with criminal proceedings, having no jurisdiction or power to afford relief in such cases. Jurisdiction over such actions is conferred upon courts especially created to hear them, and, with few exceptions, it is beyond the power of equity to control or in any manner interfere with such proceedings by injunction.'

And the exceptions he refers to do not include a case like the present. He goes on to say:

'So equity will not interfere by injunction to restrain municipal officers from the prosecution of suits for the violation of city ordinances, such proceedings being of a quasi-criminal nature, since equity will not interfere with the execution of the criminal law, whether pertaining to the state at large or to municipalities which are agents in the administration of civil governments.'

In Spelling on Injunctions (2d Ed., vol. 2, Sec. 24) it is said:

'Equity has no jurisdiction to interpose for the prevention of crime, or to enforce moral obligations, nor will it interfere for the prevention of illegal acts, merely because they are illegal. Nor have the courts of equity jurisdiction***534** to prevent by injunction the institution of bona fide prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances.'

Lord Chief Justice Holt, of the Queen's Bench, said in the case of Holderstaffe [redacted] Saunders, 6 Mod. 16 (1703), when counsel suggested that an injunction be sought in chancery, that-

'Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that, if they did, this court would break it, and protect any that would proceed in contempt of it.'

In 1742, in the Mayor and Corporation of York, 2 Atkins, 302, the plaintiffs claimed the sole right of fishing in the River House; the defendants claimed the same right, and a bill and cross-bill were

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brought to establish their several rights. While these suits were pending the plaintiffs caused the agents of the defendant to be indicted at the York sessions, where they themselves were judges, for a breach of the peace, in fishing in their liberty. An application for an injunction was made to the Lord Chancellor (Hardwicke).

'This court,' said the chancellor, 'has not originally and strictly any restraining power over criminal prosecutions. * * * If actions of trespass had been brought vi et armis this court would have stopped them; but though I cannot grant an injunction, yet I may certainly make an order upon the prosecutors to prevent the proceeding on the indictment. * * * Where parties submit their right to the court, they have certainly a jurisdiction and may interpose.'

In 1751, in Montague [redacted] Dudman, 2 Ves., Sr., 396, Lord Chancellor Hardwicke said:

'This court has no jurisdiction to stay proceedings on a mandamus, nor to an indictment, nor to any information, nor to a writ of prohibition, that I know of.'

In 1827, in Macaulay [redacted] Shackell, 1 Bligh's New R. 96, 127, Lord Eldon declared that 'a court of equity has no criminal jurisdiction.'

In 1876, in Kerr [redacted] Corporation of Preston, supra, which involved an attempt to restrain certain criminal proceedings, Jessel, M.R., said:

'Why ought a court of equity to interfere with the ordinary proceedings of a criminal court? I am not aware that any such power exists. The point came before me in Saul [redacted] Browne, L.R. 10 Ch. 64, where I declined to interfere with criminal proceedings or to follow Lord Hardwicke's doubtful decision in Mayor of York [redacted] Pilkington, 2 Atk. 302. My decision was appealed from, and the Lords Justices thought it a right decision. With the exception of that case before Lord Hardwicke, there is no instance in which a court of equity has interfered in criminal proceedings. I do not say that the court might not interfere in a possible case, but as a general rule it will not.'

In Wharton's Criminal Procedure (10th Ed., vol. 3, p. 2134) it is said:

'Court of equity has no jurisdiction to stay or enjoin criminal proceedings.'

In 16 Am. & Eng. Encyc. of Law, p. 363, it is laid down:

'A court of equity has no criminal jurisdiction, and cannot interfere to prevent the commission of criminal or illegal acts, unless there is some interference, actual or threatened, with property or rights of a pecuniary nature; but when there is such interference, and there is no adequate remedy ***535** at law, the fact that the act may be criminal will not divest the jurisdiction of equity to prevent it.'

I may stop here to say that an illustration of what is meant by the passage quoted may be found in In re Debs, 158 U.S. 564, 15 Sup.Ct. 900, 39 L.Ed. 1092. In that case, decided in 1894, Mr. Justice Brewer, speaking for the court, said:

'A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature; but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.'

The court sustained the right to punish Debs for his violation of the injunction, the injunction having been issued for the protection of property. The acts which Debs committed in violating the injunction the court said might or might not have been violations of the criminal law. 'If they were, that matter is for inquiry in other proceedings.'

In citing the English decisions above referred to I am mindful that the Supreme Court has more than once declared that the equity jurisdiction of the courts of the United States is the same in nature and extent as the equity jurisdiction of England, from which it is derived. Dodge [redacted] Woolsey, 18 How.

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331, 347, 15 L.Ed. 401;Fenn [redacted] Holme, 21 How. 481, 16 L.Ed. 198;Thompson [redacted] Railroad Companies, 6 Wall. 134, 18 L.Ed. 765;Van Norden [redacted] Morton, 99 U.S. 378, 380, 25 L.Ed. 453;Root [redacted] Railroad Co., 105 U.S. 189, 26 L.Ed. 975.

There are many decisions in the courts of this country in which the general rule has been applied that in general the equity courts are without jurisdiction to restrain criminal proceedings. In Attorney General [redacted] Utica Ins. Co., 2 Johns.Ch. 371, Chancellor Kent said:

'If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right, resting on equity, or where the remedy at law was not sufficiently adequate.'

The citations might be extended indefinitely, but enough has been said to show that the statements of the text-writers are abundantly sustained by the decisions of the courts as to what is the general rule as to the right to an injunction to restrain criminal proceedings.

I come now to inquire under what circumstances the Supreme Court has recognized a right to restrain criminal proceedings by injunction.

The question was before the court in 1887 in In re Sawyer, 124 U.S. 200, 8 Sup.Ct. 482, 31 L.Ed. 402. I shall not go into the facts that were before the court in that case, except to say that a bill was filed praying an injunction to restrain the mayor and council of a city from removing a city officer for malfeasance in office. The lower court granted the injunction, and committed the defendants for contempt in disregarding it. The Supreme Court held the injunction ***536** absolutely void, and that the order committing defendants for contempt was also void, and that defendants were entitled to their discharge on habeas corpus. In the opinion, written by Mr. Justice Gray, it is said in referring to the jurisdiction of equity:

'It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government.'

And it is also said:

'From long before the Declaration of Independence it has been settled in England that a bill to stay criminal proceedings is not within the jurisdiction of the court of chancery, whether those proceedings are by indictment or by summary process.'

Again it is said:

'The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there.'

In 1898, in Fitts [redacted] McGhee, 172 U.S. 516, 19 Sup.Ct. 269, 43 L.Ed. 535, the subject was before the court again, a suit having been brought to restrain the Governor of Alabama, the Attorney General of the state, and the solicitor of the Eleventh judicial circuit of the state, from instituting or prosecuting any indictment or criminal proceeding against any one for violating the provisions of an act of the Legislature of Alabama, prescribing certain maximum rates of toll. The court below, the cause having been discontinued as against the governor, whose term of office had expired, issued a temporary injunction on the ground that the act was unconstitutional and void, as being in violation of the Constitution of the United States. The court, in an opinion written by Mr. Justice Harlan, referred approvingly to what was held in Re Sawyer, supra. And in referring to the fact that the toll-gatherers in the plaintiff's service had been indicted in a state court for violating the provisions of the act, the court said:

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'Let them appear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. * * * That the defendants may be frequently indicted constitutes no reason why a federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court.'

The next case I will refer to is that of Ex parte Young, 209 U.S. 123, 28 Sup.Ct. 441, 52 L.Ed. 714, 13 L.R.A.(N.S.) 932, 14 Ann.Cas. 764, decided in 1908. This was an application for leave to file a petition for writs of habeas corpus and certiorari in behalf of the Attorney General of the state of Minnesota. The lower court had restrained the Attorney General from taking any steps to put in force the orders of the railroad commission of the state, and certain ***537** acts passed by the Legislature of the state fixing rates, and which subjected to criminal proceedings those who violated the provisions of the acts and the orders of the commission. It was claimed that the acts were unconstitutional as being confiscatory. The Attorney General had violated the injunction, was proceeded against for contempt, and was in the custody of the United States marshal. The Supreme Court held the acts unconstitutional. So that the court had before it (1) an unconstitutional act, (2) which act was the subject of inquiry in a suit already pending in a federal court, and (3) the intention of the state's Attorney General to enforce it. And it was held that under these circumstances the injunction was properly issued. But the case of In re Sawyer, supra, was neither overruled nor doubted. In the opinion, written by Justice Peckham, the court, referring to the rule that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, said:

'But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject-matter of inquiry in a suit already pending in a federal court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed.'

The court also pointed out that an injunction might issue to prevent unlawful interference by criminal proceedings under a void law or ordinance, where otherwise property rights would be destroyed. The case is considered consistent with In re Sawyer, supra, which the court expressly declared 'is not to the contrary.'

I concur with what is said in the opinion of the court that the case now under consideration does not fall within the exceptions stated in Ex parte Young.

No cases have come under my notice in which the Supreme Court has added to the exceptions stated in the case last cited.

In 1916 the court decided Wilson [redacted] New, 243 U.S. 332, 37 Sup.Ct. 298, 61 L.Ed. 755, L.R.A. 1917E, 938, Ann. Cas. 1918A, 1024. The suit was brought to restrain the officers of certain labor unions and a United States District Attorney from establishing an eight-hour day for interstate and foreign commerce. The act provided that any person violating it should, upon conviction, be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both. The court held the act constitutional, and reversed the court below, which had granted an injunction. The case turned upon the constitutionality of the act, and there is no decision of the question as to the power of a court of equity to enjoin criminal proceedings, and no reason for supposing that the court intended it to be understood that the jurisdiction of equity in such cases was to be extended beyond the limits stated in Ex parte Young.

In 1918 Hammer [redacted] Dagenhart, 247 U.S. 251, 38 Sup.Ct. 529,6 L.Ed. 1101, Ann. Cas. 1918E, 724, was decided. The court below had enjoined the enforcement of an act of Congress intended to prevent interstate commerce in the products of child labor. The act provided for a criminal prosecution of those violating its provisions. ***538** The only question discussed in the opinion was that of the constitutionality of the statute, and, as the court held that unconstitutional, it affirmed the lower court,

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which enjoined its enforcement. The case added nothing to what was said in Ex parte Young upon the subject now under consideration. It was a case where property rights would have been destroyed by criminal proceedings under a void law, and therefore within the exceptions stated in Justice Peckham's opinion in the Young Case.

In Truax [redacted] Raich, 239 U.S. 33, 36 Sup.Ct. 7, 60 L.Ed. 131, L.R.A. 1916D, 545, Ann. Cas. 1917B, 283, the act was unconstitutional and the Attorney General was restrained.

In Philadelphia Co. [redacted] Stimson, 223 U.S. 605, 32 Sup.Ct. 340, 56 L.Ed. 570, the statute being constitutional, the bill to enjoin enforcement was dismissed.

Does the fact that the prosecuting officer misconstrues a constitutional statute justify a court of equity in issuing an injunction to restrain him? I am not aware that the Supreme Court has so held. In the absence of such a ruling I think the doctrine announced by the Circuit Court of Appeals in the Sixth Circuit should be followed. It was there said in Arbuckle [redacted] Blackburn, 113 Fed. 623,51 C.C.A. 129,65 L.R.A. 864, that the jurisdiction of courts of equity had never been carried to that extent in authoritative decisions. 'On the contrary,' said Judge Day (afterwards Justice Day of the Supreme Court), 'the Supreme Court, in more than one instance, has denied such jurisdiction.' And he adds: 'We think this an enlargement of the jurisdiction opposed to reason and authority.' This opinion was concurred in by Judge Lurton, who also later became a member of the Supreme Court of the United States.

I concur also in the objection that to enjoin the United States attorney from proceeding under a constitutional statute is to enjoin the United States. As was said in Harkrader [redacted] Wadley, 172 U.S. 148, 160, 170, 19 Sup.Ct. 119, 127 (43 L.Ed. 399):'In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state.' If the law officer of the government attempts to enforce an unconstitutional law, he is in that attempt not representing the state, and is to that extent denied his official or representative character.

In the opinion of Judge WARD, which is the opinion of the majority of the court, the injunction is allowed to stand as against the acting and deputy collector of internal revenue. In that conclusion I am unable to concur.

The bill of complaint was originally filed, not against the collector of internal revenue of the Third district, but against Mark Eisner, who at the time of the filing of the bill occupied that office. Thereafter Mr. Eisner resigned, and upon motion the defendant McElligott was made a party to the suit, he having succeeded to the office as acting and deputy collector of internal revenue. The bill is against McElligott, describing him as acting and deputy collector of internal revenue, and the injunction runs against 'the said defendant McElligott.' It is not necessary to inquire what the effect would be in case McElligott ***539** should cease to hold the office he now fills, and whether the words 'acting and deputy collector of internal revenue ' are anything more than a descriptio personae, identifying the person intended to be bound, and not effective as against another who might succeed to the office upon his death or resignation. See Dillon on Municipal Corporations, vol. 4 (5th Ed.) Sec. 1536.

The injunction restrains McElligott, his agents, servants, subordinates, and employes,

'pending final hearing and decision of this cause, and until the further order of this court, from refusing to issue to said complainant, its agents, officers, servants, and employes, or any of them, revenue stamps in respect of such beer or malt liquor, provided the taxes payable thereon by law are duly tendered or paid to him or them, and from at any time hereafter refusing to license and to permit said complainant duly to qualify as a brewer of said beer or malt liquor, if otherwise duly qualified, even though the beer or malt liquor manufactured, produced, and sold by it, or intended so to be, contain more than one-half of one per cent. of alcohol by volume, so long as it shall contain, when disposed of for consumption, not to exceed two and three-quarters per cent. (2 3/4 p.c.) of

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alcohol by weight.'

The injunction also restrains him from-

'seizing, attempting or causing to be seized, or otherwise interfering with the property, business, and affairs of said complainant for or on account of any such violations of the provisions of said act of Congress of November 21, 1918, or said proclamation of the President, or said regulations, upon the ground or claim that beer or malt liquor containing not to exceed two and three-quarters per cent. (2 3/4 p.c.) of alcohol by weight is as matter of fact intoxicating, and that the manufacture, production, and sale of such beer or malt liquor is prohibited by the act of Congress of November 21, 1918, or by the proclamation of the President heretofore issued under and by virtue of said act of Congress of August 10, 1917, or by the regulations of the Commissioner of Internal Revenue.'

McElligott is subject to the orders of the Commissioner of Internal Revenue. That official in an affidavit states that he is acting, and will continue to act, in the matters herein involved, 'in conformity with the advice of the Department of Justice.' He states:

'That heretofore, believing that he could not properly sell stamps for tax payments on beer illegally manufactured, and that his so doing might be construed as an act on the part of the government sanctioning an illegal act, he instructed the collector of internal revenue for the Third district of New York, and the collectors of internal revenue at Philadelphia, Pa., Syracuse, N.Y., and Newark, N.J., to refuse to sell such stamps when the beer had been manufactured subsequent to December 1, 1918. But being now advised by the Department of Justice that if such beer is actually manufactured the manufacturer is liable for the tax whether the manufacture be lawful or unlawful, although in the latter event such manufacturer will be subject to prosecution for a violation of the acts above mentioned, he has canceled said instructions, and directed said collectors to sell the stamps in order that the tax in question may be paid. And this course he intends to pursue unless it shall be decided by the courts that the same is improper.

'That this affiant, acting under advice from the Department of Justice, has instructed the collector of internal revenue for the Third district of New York, N.Y., and the collectors of internal revenue at Philadelphia, Pa., Syracuse, N.Y., and Newark, N.J., not to take the seizures of beer or seizures of any property of brewers because of violations of the provisions of the Food Control Act of August 10, 1917, or regulations issued thereunder, or for violations of the act of November 21, 1918. That this affiant is advised and believes***540** that the powers of seizures of beer or of the property of brewers be exercised by collectors of internal revenues only for violations or evasions of statutes relating to the payment and collection of taxes upon the manufacture and sale of beer, and that such powers of seizure do not exist because of violations of the Food Control Act of August 10, 1917, or the act of November 21, 1918, or regulations issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury under either of the two above-named acts.'

He also states in an affidavit:

'That deponent is advised and believes, and, unless otherwise directed by the court, will act and require collectors of internal revenue to act upon the assumption that the sole penalties for such violations of section 15 of the Food Control Act of August 10, 1917, or of the rules and regulations made pursuant thereto, or of the act of November 21, 1918, are fines and imprisonments prescribed by those acts; that the penalties of seizures and forfeitures of property prescribed by the Internal Revenue Laws do not accrue because of such violations, but accrue only because of failures to comply with the Internal Revenue Laws themselves, which govern the payment and collection of taxes.'

It appears that acting under instructions from the Commissioner of Internal Revenue, issued on April 11th, and revoked on or about April 21st, McElligott refused to sell internal revenue stamps to the brewers. In relation to that matter McElligott states in his affidavit:

'After the revocation of such instructions I never required such affidavit, and never refused or

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threatened to refuse to sell internal revenue stamps to be placed on beer or barrels of beer, and have been at all times and still am ready and willing to sell the brewers all such stamps as they may wish to purchase.'

He also states:

'Affiant further says that while he held the office of collector of internal revenue of the Third district of New York, as aforesaid, he never did at any time make any threat or threats with respect to or in any manner or form as alleged in paragraph XI of the bill of complaint, or in any way or manner with respect to the matters or things therein alleged.'

In view of these affidavits, I find no justification for the issuance of an injunction against McElligott. The intention to do the prohibited acts is not shown to exist, but is expressly shown not to exist.

In Real Estate Trust Co. [redacted] Hatton, 194 Pa. 449, 45 Atl. 379, it was held that where the defendant, by answer and in open court, disclaimed any intention of doing the acts sought to be enjoined, a preliminary injunction should be denied, but that the bill would be retained, with leave to the plaintiff to apply for an injunction if the defendant disregarded his avowed intention.

Under the circumstances existing in this case, and in view of the fact that the defendant McElligott is a responsible official of the government, who disclaims any intention of doing the acts he is alleged to intend to commit, I am of the opinion that the bill should be dismissed as to him, as well as to the United States attorney, but for a different reason. As I understand, the law courts do not grant injunctions to allay fears and apprehensions without evidence that there are sufficient reasons for the fears and apprehensions which are alleged to be entertained. It must be made to appear to the court that the acts ***541** against which protection is asked are not only threatened, but will in all probability be committed to the injury of the complainant, who must show reasonable ground for apprehending that it will otherwise be done. 16 Am. & Eng.Encyc. 361. It is well to remember that there is no power the exercise of which is, in the opinion of the Supreme Court, more delicate than the issuing of an injunction. It is the strong arm of equity, which ought never to be extended, except in a clear case. Truly [redacted] Wanzer, 5 How. 142, 12 L.Ed. 88.

In view of the conclusion reached that the bill should be dismissed as to the United States attorney, it is not necessary to pass upon the question as to the construction to be given to the act of Congress approved November 21, 1918. The statute provides:

'After May 1, 1919, until the conclusion of the present war, and thereafter, until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit, or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June 30, 1919, until the conclusion of the present war, and thereafter until termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export.'

As, however, it is desired that the judges express their opinion as to the meaning of the words, 'no beer, wine or other intoxicating malt or vinous liquor,' I state my opinion. It is that the rule of construction known as ejusdem generis applies. Where general words follow the enumeration of a particular class of things, the general words will be construed as applicable to things of the same class as that enumerated. The paramount duty of a court is to see that no effect shall be given to any law which violates the Constitution. After that the next duty is to see that effect is given to the legislative intent. I am unable to see any escape from the conclusion that Congress in enacting the law had in mind intoxicating liquors. In that conclusion I agree with my Associates.

Whether beer containing not more than 2.75 per cent. of alcohol is intoxicating is not a question of law, but one of fact, and will be determined at the

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final hearing upon the merits.

The acts of Congress now under consideration contain no definition of what per cent. of alcohol makes liquor intoxicating. In a number of the states the statutes prohibit the use of all 'alcoholic' liquors for beverage purposes. In a large number the standard of an intoxicating beverage is fixed at one-half of 1 per cent. And for nearly 20 years the Bureau of Internal Revenue has treated beer containing one-half of 1 per cent. or more of alcohol as a malt liquor, and the brewers of the country have acquiesced in this definition of beer. And it is not unlikely that the present Congress, in enacting a Prohibition Enforcement Bill, will undertake to define what is intoxicating liquor, and if it does may undertake to fix the standard at one-half of 1 per cent. in accordance with the rule established for so many years in the Bureau of Internal Revenue. But, in the absence of some definitive legislation, the meaning of the term ' intoxicating liquors' is clearly ***542** left as a question of fact, and not of law, and the courts cannot undertake to say, as matter of law, that liquor which contains 2.75 per cent. of alcohol by weight is not intoxicating. And neither the opinion of my Associates, nor the opinion of the district judge, contains anything to the contrary. In the opinion of the district judge he expressly declared ' that the question whether beer having 2.75 per cent. of alcohol is intoxicating' was not before him for decision.

I summarize my conclusions as follows:

1. The acts of Congress herein involved are constitutional.

2. They relate to liquors which are intoxicating.

3. Whether liquor which contains 2.75 per cent. of alcohol in weight is intoxicating is a question of fact, which will be determined as such when the case reaches final hearing, the majority of the court having decided that the bill should not be dismissed except as against the United States attorney.

4. That the bill should have been dismissed not only as against the United States attorney, but also against the acting and deputy collector of internal revenue.

5. That a United States attorney under certain circumstances may be restrained from instituting criminal proceedings under an unconstitutional law.

6. That under the circumstances existing in this case he cannot be restrained from instituting such proceedings under a constitutional law, the construction of which it is alleged he misapprehends.

HOUGH, Circuit Judge (dissenting in part).
In the result reached by Judge WARD i concur, and with the opinion I agree, except in so far as it bases the modification of injunction order on a lack of ' power to stay the United States attorney' from instituting any and every criminal proceeding under any constitutional statute.

The matter is one of degree, not of kind or power. A prosecuting officer's threatened act may be so preposterously unlawful (though not unconstitutional) as to justify the intervention of equity.

Injunction is always against human action, and no logical difference, either as to wrong or remedy, can be pointed out between unconstitutional human action and similar action without color of law therefor.

The wrong here complained of, however, was and is that of the Internal Revenue Department of the Treasury. Under laws in force long before 1918, every brewer (practically) brewed on sufferance of the commissioner. As July 1, 1919, approached that official threatened to refuse the licenses and stamps, without which brewing is absolutely illicit, and subjects the brewer to confiscatory proceedings and penalties of extreme severity. The plain intent was to enforce a strained construction of the act of November 21, 1918, by preventing brewers from complying with pre-existing and unrepealed law.

So far as I can now see, the injunction against the collector stops that plan, and I regard the relief obtained below against the United States attorney as

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in effect preventing that official from asking at the hands of a grand jury indictments for offenses created only by the act of November 21st itself.

***543** Such possible indictments would not involve preliminary seizure of plant and tools, and they should be left to their course at common law, except under circumstances of extreme necessity, not here shown. This dissent, then, is limited to the reason assigned for a result to which I agree.

C.A.2 1919.
Jacob Hoffman Brewing Co. [redacted]. McElligott
259 F. 525, 170 C.C.A. 487

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sufficiently analogous guideline, [to sentence the defendant according to] the provisions of 18 U.S.C. § 3553."U.S.S.G. § 2X5.1. Accordingly, under our case law, the district court first had to determine whether *any* guideline was sufficiently analogous to be used in sentencing Mr. Rakes. *United States [redacted] Nichols,* 169 F.3d 1255, 1270 (10th Cir.1999). If more than one sufficiently analogous guideline could be found, the court then had to assess which qualified as the *most* analogous, and employ it in sentencing Mr. Rakes. *Id.* at 1271.Put another way, the court first had to ask what analogous provisions were within the ballpark; it then had to ask which represented the best fit. On appeal, we review the district court's determinations on these scores *de novo* to the extent they rest on legal bases, and for clear error to the extent they rest on factual findings. *Id.* at 1270-71;*United States [redacted] Fortier,* 180 F.3d 1217, 1225 (10th Cir.1999). Because the parties' dispute in this case involves only an interpretation of the Guidelines, our *de novo* standard applies.

A

On the first question posed by our test, we discern no material disagreement between the parties. We generally compare the elements of the defendant's crime to the elements of federal offenses already covered by specific Guidelines sections to ascertain which plausible analogies exist for sentencing. *Id.* at 1270.Here, the parties seem to agree that two candidates emerge from this process-Sections 2A6.1 and 2A2.4. The offense of which the jury convicted Mr. Rakes requires (1) two or more persons to conspire (2) to prevent any person from discharging the duties of their office under the United States (3) by force, intimidation, or threat. *See*18 U.S.C. § 372 . Guideline 2A6.1 applies to threatening or harassing communications, and the majority of the offenses covered by that section capture the threat and intimidation aspect of 18 U.S.C. § 372, requiring a threat of harm against a person, and some require that the person be a particular officer of the United States. *See*18 U.S.C. §§ 32(c), 871, 876, 877, 878(a), 879, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. § 46507. Meanwhile, guideline 2A2.4 applies to efforts to obstruct or impede various officers or employees of the United States by force, *see*18 U.S.C. §§ 111, 1501, 1502, to the obstruction of a federal law enforcement agent, *see*18 U.S.C. § 3056(d), and to interference with the administration of internal revenue laws by force or threat of force, *see*26 U.S.C. § 7212(a).

B

*7 Which of these two provisions, 2A6.1 or 2A2.4, is most analogous and thus properly employed in this case is where the dispute begins. The government argues, and the district court agreed, that 2A6.1 is the most analogous provision. Mr. Rakes disagrees, submitting that 2A2.4 is the apter section. The dispute is hardly inconsequential: under 2A6.1, with the appropriate adjustments for Mr. Rakes's criminal history and offense characteristics, his advisory Guidelines sentencing range is 63 to 78 months; under 2A2.4 with similar adjustments, his sentencing range is only 37 to 46 months.

In approaching the resolution of this dispute, we pause to acknowledge an antecedent complication. Our sister circuits have adopted competing approaches to the question of what information a court should look at when deciding which Guidelines section is the most analogous. *See Nichols,* 169 F.3d at 1271. Some courts restrict their analysis to the facts alleged in the indictment or information. *Id.; see*U.S.S.G. § 1B1.2(a); *United States [redacted] Saavedra,* 148 F.3d 1311, 1316-18 (11th Cir.1998); *United States [redacted] Hornsby,* 88 F.3d 336, 338-39 (5th Cir.1996); *United States [redacted] Terry,* 86 F.3d 353, 357-78 (4th Cir.1996). Others look beyond such documents to examine the defendant's proven relevant conduct. *Nichols,* 169 F.3d at 1271; *see*U.S.S.G. § 1B1.3; *United States [redacted] Osborne,* 164 F.3d 434, 438 (8th Cir.1999); *United States [redacted] Marquardo,* 149 F.3d 36, 45 (1st Cir.1998); *United States [redacted] Clay,* 117 F.3d 317, 319-20 (6th Cir.1997) . The parties in this case do not advocate for either approach and because we conclude that the district court chose the appropriate guideline using either methodology, we decline to enter this inter-circuit fray today.

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Looking solely to the face of Count II of the indictment, it charged Mr. Rakes with a conspiracy to threaten and intimidate a federal prosecutor; alleged that he conspired to write a letter with threatening language, listing the street on which the victim lived; and contended that he or a co-conspirator sent the letter to the victim through the mail. Guideline 2A6.1 appears most analogous to the offense conduct charged in Count II because, as the district court noted, it better captures the element of a letter seeking to threaten or intimidate a public official. The majority of the 2A6.1 listed offenses concern threats of harm. *See*U.S.S.G. § 2A6.1. By contrast, most (though admittedly not all) of the offenses listed as predicates for guideline 2A2.4 do not involve threats or intimidation and the concomitant complexities and premeditation such actions imply, but instead concern simple assaults against officers of the United States. *See*U.S.S.G. § 2A2.4. Accordingly, when compared against the indictment itself, 2A6.1 appears the most analogous guideline.

An examination of all the circumstances of the case confirms rather than alters this conclusion. The case actually proven at trial against Mr. Rakes centered around the threatening letter-focusing on his involvement in writing the letter, addressing it, and conveying its threat to the victim prosecutor. Although the evidence showed that Mr. Rakes sought to impede the prosecution of members of the Soldiers of Aryan Culture, it also demonstrated that he intended to accomplish this goal by means (at least in the first instance) of a premeditated and comparatively complex scheme of intimidation rather than by an act of simple assault.

C

***8** Mr. Rakes objects that, like 18 U.S.C. § 372, guideline 2A2.4 incorporates the fact that the victim was a governmental officer, while guideline 2A6.1 is not necessarily so limited. And this is surely true. But while 2A6.1 does not incorporate the official status of the victim into the base offense level, the Guidelines enhancement for an official victim, Section 3A1.2, expressly applies to 2A6.1 and not 2A2.4. *See*U.S. S.G. § 2A2.4 n. 2. Thus, the status of the victim is covered by both provisions and no reason to distinguish between them. Confirming the point, the district court applied the official victim enhancement to Mr. Rakes's sentence, making his sentence under guideline 2A6.1 track the elements of 18 U .S.C. § 372 almost exactly.

Mr. Rakes next argues that guideline 2A2.4 is most analogous because its title, "Obstructing or impeding officers," employs an almost identical formulation as the title language of 18 U.S.C. § 372 , "Conspiracy to impede or injure officer."But whether we adopt the face of the indictment test or the competing proven conduct test, in neither circumstance is the question as facile as matching titles of statutes and guidelines. Both require more analysis from us than that. Neither can titles of statutory or Guidelines provisions limit the plain meaning of the provisions themselves. *See Griffin* [redacted] *Steeltek, Inc.,* 160 F.3d 591, 594 n. 4 (10th Cir.1998) ("[T]he title to a statutory provision is not part of the law itself."); 2A *Sutherland Statutory Construction* § 47:3 (7th ed.) (stating the statutory title "does not constitute part of the statute and is not controlling regarding its construction or interpretation").

Looking beyond titles, Mr. Rakes suggests that guideline 2A2.4 is the most analogous because one of the statutes (though only one of the at least 30 statutes) covered by the guideline, 26 U.S.C. § 7212 , proscribes threatening conduct similar to that of 18 U.S.C. § 372. Section 7212, part of the Internal Revenue Code, proscribes using force or threats of force, including threatening letters or communications, to intimidate or impede internal revenue officers or the administration of the internal revenue laws. 26 U.S.C. § 7212.

Although we concede that the offense conduct in § 7212 is similar to the § 372 offense conduct in this case to the extent both center on communicating threats to federal officers, Mr. Rakes's argument fails to take account of the fact that § 7212 actually consists of two parts with two different applicable guidelines. The first part, intimidating or impeding a tax administration officer of the United States, uses guideline 2A2.4, but the second part, obstructing or impeding the due administration of

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the internal revenue laws, employs guideline 2J1.2, obstruction of justice, which is more severe than 2A2.4. *See* U.S.S.G. app. A; *United States* [redacted] *Gunwall,* 1998 WL 482787, at *3 (10th Cir.1998). And, in fact, guideline 2J1.2 imposes sentences more akin to those found in 2A6.1, the provision employed by the district court in this case. For example, given Mr. Rakes's offense conduct and criminal history, his 2A6.1 advisory sentencing range would be 63-78 months; with the same offense characteristics and criminal history, his sentencing range under 2J1.2 would be 70-87 months (as opposed to 37-46 months under 2A2.4). The indictment in this case not only charged Mr. Rakes with conspiring to threaten the prosecutor but also with conspiring to impede and thwart the prosecution of members of the Soldiers of Aryan Culture, that is, impede the due administration of the law. Thus, even if § 7212 were similar to the offense in this case, Mr. Rakes's conduct would likely implicate, and be more analogous to, the more severe guideline, not 2A2.4, as he urges.

***9** Finally, Mr. Rakes contends that it was improper for the district court to sentence him under guideline 2A6.1, threatening or harassing communications, when the court granted him an acquittal on mailing a threatening communication, 18 U.S.C. § 876, which falls squarely within guideline 2A6.1. We have, however, already rejected precisely this argument in *Nichols.*There, the jury in the Oklahoma City bombing trial acquitted Terry Nichols on counts of first and second degree murder, but the district court sentenced him for his crime of conviction-conspiring to use a weapon of mass destruction-under the guideline applicable to first degree murder. *Nichols,* 169 F.3d at 1276 n. 7. We affirmed Mr. Nichols's sentence under the first degree murder guideline, finding that it was the most analogous, and his acquittal of murder did not affect our "most analogous guideline" inquiry. *See id.* at 1270-76;*see also United States* [redacted] *Sarracino,* 131 F.3d 943, 950 (10th Cir .1997) (finding no merit in the argument that acquittal of first degree murder should preclude use of the first degree murder offense level at sentencing). Mr. Rakes offers us no reason why *Nichols* does not control the outcome of his case on this point.

* * *

The district court's judgment is *Affirmed.*

FN1. Mr. Rakes was not prosecuted for the offense that was the subject of his rejected plea agreement, misprision of a felony. Misprision of a felony is a lesser offense than conspiracy to impede or injure an officer, hence its more modest recommended sentencing range of 18 to 24 months imprisonment.

FN2. The government requested that its supplemental record, including the victim impact letter, the threat letter and envelope, and the first presentence report, be sealed-a motion that we provisionally granted on May 7, 2007, pending this panel's final decision. Today, we confirm our prior ruling and grant the government's (unopposed) motion.

FN3.*See also*3 Charles Alan Wright et al., *Federal Practice & Procedure* § 524 (3d ed.) (reporting that Rule 32 was amended to respond to "the concern that the vitally important sentencing decision will be made on the basis of erroneous information "); *United States* [redacted] *Hamad,* 495 F.3d 241, 243 (6th Cir.2007) (holding that, because " escalation of a sentence based on undisclosed evidence raises serious due process concerns,"Rule 32 requires a sentencing court "either to disclose sufficient details about the evidence to give the defendant a reasonable opportunity to respond or ... to refrain from relying on the evidence"); *United States* [redacted] *Baldrich,* 471 F.3d 1110, 1113 (9th Cir.2006) (pointing out Rule 32's concern with *ex parte* communications that may result in the district court considering undisclosed or improper facts).

C.A.10 (Utah),2007.
U.S. [redacted] Rakes
--- F.3d ----, 2007 WL 4510264 (C.A.10 (Utah))

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--- F.3d ----, 2007 WL 4510264 (C.A.10 (Utah))
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507 F.3d 1213, 07 Cal. Daily Op. Serv. 13,202, 2007 Daily Journal D.A.R. 17,149
(Cite as: 507 F.3d 1213)

C
U.S. [redacted]. Garcia
C.A.9 (Wash.),2007.

United States Court of Appeals,Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Adrian GARCIA, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Ivan Torres, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Miguel Plascencia-Alvarado, also known as Esteban Garcia-Morales also known as Angel Caloca, Defendant-Appellant.
Nos. 05-30356, 05-30391, 05-30415.

Argued and Submitted July 25, 2006.
Submission Withdrawn Oct. 31, 2006.
Resubmitted Nov. 1, 2007.
Filed Nov. 19, 2007.

Background: Defendants pled guilty in the United States District Court for the Western District of Washington, Marsha J. Pechman, J., to drug conspiracy. Defendants appealed.

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

(1) it lacked jurisdiction to review sentence imposed within range stipulated to in defendant's plea agreement;

(2) drug testing supervised release condition did not impermissibly delegate authority to set maximum number of non-treatment drug tests to probation officer; and

(3) district court could impose financial disclosure requirement to supervised release.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐1026.10(4)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1025 Right of Defendant to Review
110k1026.10 Waiver or Loss of Right
110k1026.10(2) Plea of Guilty or Nolo Contendere
110k1026.10(4) k. Issues Considered. Most Cited Cases

Court of Appeals lacked jurisdiction to review sentence imposed within range stipulated to in defendant's plea agreement, which was well within statutory maximum, since sentence was not imposed in violation of law and not contingent on Guidelines. 18 U.S.C.A. § 3742(a)(1); Fed.Rules Cr.Proc.Rule **11(c)(1)(C)**, 18 U.S.C.A.

[2] Criminal Law 110 ⇐1023(11)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders
110k1023(11) k. Requisites and Sufficiency of Judgment or Sentence. Most Cited Cases

Appellate courts are granted limited jurisdiction to review a defendant's challenge to a district court's sentence. 18 U.S.C.A. § 3742(a).

[3] Criminal Law 110 ⇐1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases

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The Court of Appeals generally **defers** to the district court in imposing supervised release conditions and reviews them for an abuse of discretion.

[4] Criminal Law 110 ⇐1042

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Where defendant did not object to the conditions of his supervised release before the sentencing court, the Court of Appeals reviews for plain error.

[5] Sentencing and Punishment 350H ⇐1977(2)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions
350Hk1977 Rehabilitation and Therapy
350Hk1977(2) k. Validity. Most Cited Cases
Supervised release condition that defendant submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter did not impermissibly delegate authority to set maximum number of non-treatment drug tests to probation officer, where government conceded that probation office could conduct only the minimum three tests allowed for in order.

[6] Sentencing and Punishment 350H ⇐1983(2)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions
350Hk1983 Other Particular Conditions
350Hk1983(2) k. Validity. Most Cited Cases
District court could impose financial disclosure requirement to supervised release for defendant who pled guilty to drug trafficking; defendant was involved in large scale drug conspiracy as drug supplier, defendant had history of drug abuse, if defendant received or spent significant funds in suspicious way probation office would have reason to believe that defendant reengaged with drug trafficking, and financial disclosure requirement reflected appreciation of nature of defendant's crimes and served to protect public from further crimes. 18 U.S.C.A. § 3553(a)(1), (a)(2)(C).

[7] Sentencing and Punishment 350H ⇐1983(1)

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(G) Conditions of Probation
350Hk1964 Particular Terms and Conditions
350Hk1983 Other Particular Conditions
350Hk1983(1) k. In General. Most Cited Cases
A district court may impose a financial disclosure condition to supervised release even without ordering restitution, so long as the condition is reasonably related to the statutory sentencing factors, involves no greater deprivation of liberty than is reasonably necessary, and is consistent with pertinent policy statements of the Sentencing Commission. 18 U.S.C.A. § 3553(a).

***1215** Mary Anne Royle, Vancouver, WA, for defendant-appellant Adrian Garcia.
Nancy L. Talner, Seattle, WA, for defendant-appellant Miguel Plascencia-Alvarado.
Jeffrey E. Ellis, Law Offices of Ellis, Holmes & Witchley, PLLC, Seattle, WA, for defendant-appellant Ivan Torres.
John L. Lulejian (argued), Assistant United States Attorney, and James M. Lord, Assistant United States Attorney, Seattle, WA, for the plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington; Marsha J. Pechman, District Judge, Presiding. D.C. Nos. CR-04-00301-016-MJP, CR-04-00301-003-MJP, CR-04-00301-007-MJP.

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Before: J. CLIFFORD WALLACE, KIM MCLANE WARDLAW and RAYMOND C. FISHER, Circuit Judges.

FISHER, Circuit Judge:

This appeal requires us to consider several allegations of sentencing error. Initially, we must decide whether we have jurisdiction to review a sentence that is imposed in accordance with a plea agreement under Federal Rule of Criminal Procedure **11(c)(1)(C)** and that is not contingent upon the advisory Sentencing Guidelines. We also must determine whether a district court commits plain error by failing to explicitly set the maximum number of non-treatment related drug tests to which the defendant will be exposed as a condition of supervised release. Finally, we must evaluate whether a district court commits plain error by imposing a financial disclosure condition on a defendant who has been convicted of a drug trafficking offense and has a history of drug use.

We hold that we do not have jurisdiction to review a sentence within the range agreed to in a Rule **11(c)(1)(C)** plea agreement, and that the district court did not commit plain error by imposing either condition.

I. Background

Because the issues on appeal are exclusively related to sentencing, we need not recount detailed facts of the underlying criminal offenses to which the defendants pled guilty. Rather, we explain only those facts relevant to our resolution of the defendants' allegations of sentencing error.

Adrian Garcia, Ivan Torres and Miguel Plascencia-Alvarado were all involved in a large-scale drug trafficking conspiracy in the Western District of Washington. After being charged with various crimes, all three entered into Rule 11 written plea agreements. *See* Fed.R.Crim.P. **11(c)(1)(C)**.[FN1] Garcia pled guilty to conspiracy to distribute less than 500 grams of ***1216** cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); Plascencia-Alvarado pled guilty to conspiracy to distribute methamphetamine and cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C); and Torres pled guilty to conspiracy to distribute less than five grams of methamphetamine and less than 50 grams of a mixture containing methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), as well as witness tampering in violation of 18 U.S.C. § 1513(b)(2). In accordance with their respective plea agreements, Garcia was sentenced to 48 months imprisonment and Plascencia-Alvarado was sentenced to 60 months imprisonment. Torres was sentenced to 66 months imprisonment, also pursuant to his plea agreement, and is subject to various supervised release conditions. Garcia and Plascencia-Alvarado appeal their sentences, and Torres appeals the district court's imposition of certain supervised release conditions.

> FN1. Rule **11(c)(1)(C)** provides in part:
> An attorney for the government and the defendant's attorney ... may discuss and reach a plea agreement.... If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will ... agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

A. Garcia and Plascencia-Alvarado

Garcia's and Plascencia-Alvarado's plea agreements are nearly identical in all material respects. In both plea agreements, the defendants accepted that the maximum statutory penalty for their offenses is 20 years imprisonment, waived their right to a trial and agreed that the district court "will consider the factors set forth in Title 18, United States Code, Section 3553(a), including the sentencing range calculated under the United States Sentencing Guidelines" but "is not bound by any recommendation regarding the sentence to be imposed, or by any calculation or estimation of the Sentencing Guidelines range offered by the parties,

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or by the United States Probation Department." Most importantly, Garcia agreed that "the appropriate sentence of imprisonment to be imposed by the Court at the time of sentencing should be within the range of twenty-four (24) to forty-eight (48) months," and Plascencia-Alvarado agreed that the appropriate sentence in his case was "fifty-four (54) to ninety (90) months." In light of these stipulated sentencing ranges, the parties acknowledged that "the Court retains *full discretion* to impose a sentence within the range agreed to above." (Emphasis added.)

At sentencing, the district court accepted Garcia's plea agreement and calculated the advisory guidelines range.[FN2] In so doing, the court, over Garcia's objection, attributed to him "the amount of cocaine that the Garcia arm of this organization was responsible for," which was nearly five kilograms. The district court also granted Garcia a three-point reduction for acceptance of responsibility, and adjusted downward the Presentence Report's criminal history calculation. After rejecting Garcia's request for a two-point reduction for his minor role in the offense, the district court arrived at a guidelines recommended range of 97 to 121 months. However, because the district court had accepted the plea agreement, Garcia was ultimately sentenced to 48 months imprisonment.[FN3] Garcia ***1217** appeals this sentence, arguing that the district court erred in calculating the guidelines range because it applied the wrong burden of proof with respect to the drug quantity attributed to Garcia. Had the district court applied the correct evidentiary standard, Garcia argues, it would have arrived at a lower guidelines calculation and he would have received a 24-month sentence.

> FN2. During sentencing, the district court acknowledged that its guidelines calculation "appear[ed] academic ... because [the court was] going to accept the **11(c)(1)(C)** plea agreement."
>
> FN3. In justifying its sentence at the high end of the stipulated range, the district court explained that the sentence was lower than the guidelines range, was " consistent with others who were" involved in similar offenses arising out of the conspiracy, reflected the quality of Garcia's cooperation with the government and served to deter others from criminal conduct.

As with Garcia, the district court accepted Plascencia-Alvarado's plea agreement and calculated his advisory guidelines range to be 108 to 135 months imprisonment. Plascencia-Alvarado argued to the district court that he should receive a 54-month sentence (at the low end of the plea agreement stipulation) because of various equities he believed were in his favor, including his relationship with his young daughter. He further claimed that other similarly situated defendants received comparable sentences. The district court rejected these arguments and sentenced Plascencia-Alvarado to 60 months imprisonment (still at the lower end of his plea agreement's stipulated range).[FN4] Plascencia-Alvarado appeals this sentence as unreasonable in light of the 18 U.S.C. § 3553(a) factors.

> FN4. The district court judge explained that Plascencia-Alvarado's sentence reflected his role in the conspiracy, was comparable to that imposed upon others charged with similar conduct and accounted for his contrition and lack of prior drug trafficking offenses.

B. Torres

Torres' plea agreement stipulated to a fixed sentence of 66 months and acknowledged "that the Court retains full discretion with regard to the imposition of a term of supervised release, the conditions of supervised release, fines, forfeiture or restitution." At sentencing, the district court accepted the Rule 11 plea agreement and sentenced Torres to the agreed upon term. The district court also imposed several conditions of supervised release, including that Torres (1)"shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;" (2) "shall

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submit to mandatory drug testing pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d)" (drug testing condition); and (3) "shall provide his probation officer with access to any requested financial information, including authorization to conduct credit checks and obtain copies of defendant's Federal Income Tax Returns" (financial disclosure condition). Although Torres did not object to these conditions at sentencing, he now argues that the district court erred in imposing them.

II. Analysis

A. Garcia and Plascencia-Alvarado[FN5]

FN5. Because both Garcia's and Plascencia-Alvarado's challenges implicate the same dispositive issue, we address their claims jointly.

[1] As an initial matter, the government argues that we lack jurisdiction to review these defendants' sentences because they each received a sentence within the range stipulated to in their plea agreements.[FN6] That is, because the defendants received the benefit of their plea bargains, they may not now challenge the sentences.

FN6. Neither Garcia nor Plascencia-Alvarado expressly waived the right to appeal the district court's sentence. *Cf. United States [redacted] Joyce,* 357 F.3d 921, 922-23 (9th Cir.2004) ("A defendant's waiver of his appellate rights is enforceable if the language of the waiver encompasses his right to appeal on the grounds raised, and if the waiver was knowingly and voluntarily made. Plea agreements are contracts between a defendant and the government, and we generally construe ambiguous language in favor of the defendant."(internal citations omitted)).

***1218** [2] 18 U.S.C. § 3742(a) grants appellate courts limited jurisdiction to review a defendant's challenge to a district court's sentence. *See United States [redacted] Barron-[redacted]* 922 F.2d 549, 553 (9th Cir.1991). To entertain either Garcia's or Plascencia-Alvarado's claim of sentencing error, we must find that some provision of § 3742(a) applies, thus establishing our jurisdiction. Specifically, the statute provides in relevant part:

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence-
(1) was imposed in violation of law;
(2) was imposed as a result of an incorrect application of the sentencing guidelines; or
(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range ...; or
(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742(a). Garcia asserts that we may review his sentence for guidelines calculation error under either § 3742(a)(1) or (2), whereas Plascencia-Alvarado relies only on § 3742(a)(1) to argue that we have jurisdiction to determine whether his sentence is unreasonable.[FN7] We conclude that we are without jurisdiction to entertain either Garcia's or Plascencia-Alvarado's appeal.

FN7. There was some discussion at oral argument regarding the applicability of 18 U.S.C. § 3742(c), which provides that " [i]n the case of a plea agreement that includes a specific sentence under rule [**11(c)(1)(C)**] of the Federal Rules of Criminal Procedure-(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of [18 U.S.C. § 3742(a)] unless the sentence imposed is greater than the sentence set forth in such agreement." Because neither Garcia nor Plascencia-Alvarado asserts that § 3742(a)(3) or (4) applies, we need not explore whether § 3742(c), which by its

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> terms refers only to a plea agreement providing for a *specific sentence,* applies to cases such as this where the plea agreement provides for a *specific sentencing range.*

Section 3742(a)(1) allows us to review a sentence " imposed in violation of law." We have held that where a defendant is given the minimum sentence permitted by the statute of conviction, *see United States v. Littlefield,* 105 F.3d 527, 528 (9th Cir.1997), or a sentence within the statutory maximum, *see United States v. Baramdyka,* 95 F.3d 840, 843-44 (9th Cir.1996), such a sentence is not illegal, and therefore does not violate the law. In this case, our jurisdiction is not established under § 3742(a)(1) because both Garcia and Plascencia-Alvarado received sentences well within the statutory maximums. Therefore their sentences were not "imposed in violation of law."

More recently, we held that § 3742(a)(1) confers jurisdiction to review sentences imposed within the advisory guidelines range if the defendant challenges the sentence as unreasonable under the § 3553(a) factors, because unreasonable sentences are "imposed in violation of law." *UnitedStates v. Plouffe,* 445 F.3d 1126, 1130 (9th Cir.2006) ("A sentence that is within the Guidelines range ... may be unreasonable and thus imposed in violation of law pursuant to § 3742(a)(1)."). Garcia and Plascencia-Alvarado invoke *Plouffe* to argue that jurisdiction properly lies because their sentences failed to satisfy § 3553(a) either because the guidelines range was improperly computed, *see*§ 3553(a)(4), or because the other factors were not properly weighed. However, *Plouffe* is inapplicable to the sentences in this case. *Plouffe* considered only appeals of sentences imposed ***1219** within and pursuant to the applicable advisory guidelines range. *Plouffe,* 445 F.3d at 1129-30. In reasoning that we have jurisdiction to review even within-guidelines sentences for reasonableness, *Plouffe* relied on *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), which held that the reasonableness (and therefore legality) of a sentence must be evaluated in light of all of the § 3553(a) factors, not just the guidelines calculation. *Plouffe,* 445 F.3d at 1130 (citing *Booker,* 543 U.S. at 245-46, 125 S.Ct. 738).

Unlike Plouffe, Garcia and Plascencia-Alvarado were not sentenced pursuant to the guidelines. Their sentences were within the range they agreed to in their Rule **11(c)(1)(C)** plea agreements, and although each agreement contemplated that the district court would calculate the guidelines range, it did not condition the sentence on a properly calculated range. We have already held that such stipulated sentences need not comport with the guidelines, as they are "not based on the [g]uidelines." [FN8] *United States v. Pacheco-Navarette,* 432 F.3d 967, 971 (9th Cir.2005) ("We conclude that, where a defendant was sentenced after pleading guilty pursuant to a plea agreement that included a specific sentence stipulation that did not exceed the statutory maximum and was not contingent upon the Guidelines, remand is not required to comport with *Booker* and [*United States v. Ameline,* 409 F.3d 1073(9th Cir.2005) (en banc)]."); *see also United States v. Cieslowski,* 410 F.3d 353, 364 (7th Cir.2005) ("A sentence imposed under a Rule **11(c)(1)(C)** plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea. As *Booker* is concerned with sentences arising under the Guidelines, it is inapplicable in this situation." (internal citation omitted)). Consequently, we hold that we do not have jurisdiction to review a sentence that was imposed pursuant to a Rule **11(c)(1)(C)** plea agreement and was not contingent on the guidelines, where the defendant claims only that there was some error in the district court's calculation of the guidelines or application of *Booker.*[FN9] *See United States v. Silva,* 413 F.3d 1283, 1284 (10th Cir.2005) ("Silva's only plausible argument [that the court has jurisdiction] is that his sentence was imposed in violation of law because it was given under a mandatory sentencing scheme. But this argument fails for the simple and obvious reason that Silva received the specific sentence he bargained for as part of his guilty plea."). We therefore dismiss Garcia and Plascencia-Alvarado's appeals of their sentences.

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FN8. Because Garcia's Rule **11(c)(1)(C)** stipulated sentence was not conditioned by a requirement that it comport with the guidelines, and was not contingent upon them, his argument that we have jurisdiction under § 3742(a)(2) must also fail.

FN9. As in *Pacheco-Navarette,* we do not here address "whether or to what extent a plea agreement containing a stipulation of a particular Guideline range or a sentence otherwise based or contingent upon the Guidelines must comport with the Guidelines, as that situation is not before us." 432 F.3d at 971 n. 3. Furthermore, because we lack jurisdiction to review Garcia's and Plascencia-Alvarado's sentences, we do not address the applicability of *Rita* [redacted] *United States,* --- U.S. ----, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), *United States* [redacted] *Carty,* 453 F.3d 1214 (9th Cir.2006), *reh'g en banc granted,*462 F.3d 1066 (9th Cir.2006), or *United States* [redacted] *Zavala,* 443 F.3d 1165 (9th Cir.2006), *reh'g en banc granted,*462 F.3d 1066 (9th Cir.2006).

B. Torres

Torres challenges the district court's imposition of both the drug testing and financial disclosure conditions. As to drug testing, Torres argues that the district court erred in failing to specify the maximum number of non-treatment drug tests, ***1220** thereby impermissibly delegating that authority to Torres' probation officer. *See United States* [redacted] *Stephens,* 424 F.3d 876, 881 (9th Cir.2005) (holding that "a probation officer may not decide the ... extent of the punishment imposed," because " [u]nder our constitutional system the right to ... impose the punishment provided by law is judicial" (alteration in original) (internal quotation marks and punctuation omitted)). Torres also argues that the district court abused its discretion in imposing the financial disclosure condition because it is not " reasonably related to the crime of conviction."

[3][4] We generally **defer** to the district court in imposing supervised release conditions and review them for an abuse of discretion. *United States* [redacted] *Johnson,* 998 F.2d 696, 697(9th Cir.1993). Because Torres did not object to the conditions of his supervised release before the sentencing court, however, we review for plain error. *See Stephens,* 424 F.3d at 879 n. 1. We conclude there was no error, much less plain error, in the district court's sentence.

1. Drug Testing Condition

[5] The district court directed Torres to "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" and to " submit to mandatory drug testing pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d)." FN10 Although recitation of this boilerplate drug testing language established the minimum number of drug tests to which Torres would be subject, it does not appear to establish a maximum number of such tests. However, as we held in *Stephens,*"the [sentencing] courts [have] the responsibility of stating the maximum number of [drug] tests to be performed or to set a range for the permissible number of tests." 424 F.3d at 883(concluding that " while the district court itself determined the *minimum* number of tests to which [the defendant] would be required to submit, the court erred when it failed to state the *maximum* number of non-treatment drug tests the probation officer could impose"). Unlike in *Stephens,* where the district court expressly delegated the authority to set a maximum number of non-treatment drug tests to the probation officer, *id.* at 878, in this case the district court made no such delegation. Nonetheless, because the district court did not set a maximum, Torres reasonably argues that the probation officer could be understood as having this authority, which would clearly violate *Stephens.*

FN10. 18 U.S.C. § 3563(a)(5) applies to drug testing conditions of probation, whereas § 3583(d) applies to a condition of supervised release. Both statutory sections provide that courts shall order

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> as an explicit condition of [probation or supervised release,] that the defendant refrain from any unlawful use of a controlled substance and submit to [a] drug test within 15 days of release on [probation or supervised release] and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance.

In *United States* ▮ *Maciel-Vasquez,* 458 F.3d 994(9th Cir.2006), *cert. denied,*--- U.S. ----, 127 S.Ct. 2097, 167 L.Ed.2d 817 (2007), the defendant challenged a drug testing condition of supervised release that required him to "participate in outpatient substance abuse treatment and submit to drug and alcohol testing as instructed by the probation officer." *Id.* at 996(internal quotation marks omitted). We observed that this condition would be permissible if imposed incidental to a drug treatment program, but would be improper under *Stephens* if it were to be understood as granting "the probation officer authority to require testing apart from any treatment program." *Id.* However, we refused to ***1221** determine the purpose of the drug testing because the defendant did not object at sentencing and could not establish any plain error. *Id.* Unlike in *Maciel-Vasquez,* the government here concedes that "the Probation Office may conduct only the minimum three tests allowed for in the order." Indeed, it is clear that district courts that seek to impose more than the statutory minimum of three drug tests must explicitly do so at sentencing. *See United States* ▮ *Lewandowski,* 372 F.3d 470, 471 (1st Cir.2004) (per curiam). Given the government's concession, we construe the district court's supervised release condition as implicitly limiting the maximum number of drug tests to three. Torres must submit to at least and at most "one drug test within 15 days of release from imprisonment and ... two periodic drug tests thereafter." Should the probation office believe more drug tests are necessary, it would have to request a modification from the district court. Any such modification would of course have to comply with *Stephens.* Thus construed, there is no error in the district court's drug testing condition.

2. Financial Disclosure Condition

[6][7] District courts are encouraged to impose a financial disclosure condition when they require a defendant to pay restitution. *See*U.S.S.G. § 5D1.3(d)(3)(instructing that where "the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine," it should also impose "a condition requiring the defendant to provide the probation officer access to any requested financial information"). However, a district court may impose such a condition even without ordering restitution, so long as the condition satisfies certain criteria.[FN11] First, it must be "reasonably related to the factors set forth in 18 U.S.C. § 3553(a)." *United States* ▮ *Gallaher,* 275 F.3d 784, 793 (9th Cir.2001); *see also United States* ▮ *Brown,* 402 F.3d 133, 137 (2d Cir.2005) ("[T]he Guidelines recommend a financial disclosure special condition where the court imposes a fine or restitution. By its own terms, however, this policy statement does not preclude a court from requiring financial disclosure in other 'appropriate' situations."(internal citation omitted)). Second, it must " involve no greater deprivation of liberty than is reasonably necessary...."*United States* ▮ *Fellows,* 157 F.3d 1197, 1204 (9th Cir.1998). Finally, the condition "must be consistent with pertinent policy statements of the Sentencing Commission." *Id.*

> FN11. Moreover, contrary to Torres' argument otherwise, the condition need not "be related to the offense of conviction." *United States* ▮ *Wise,* 391 F.3d 1027, 1031 (9th Cir.2004).

The financial disclosure requirement imposed on Torres satisfies all three criteria, and the district court did not commit plain error by imposing the condition. Torres was involved in a large scale drug conspiracy as a drug supplier. Torres also has a history of drug abuse. Clearly, if Torres is receiving or spending significant funds in suspicious ways, the probation office would have reason to believe he has reengaged with drug trafficking or use and would so report to the district court. Requiring Torres to disclose financial information, at the very least, reflects appreciation

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of "the nature and circumstances of the offense and [his] history and characteristics" and serves "to protect the public from further crimes." 18 U.S.C. § § 3553(a)(1), (a)(2)(C). And the probation office's monitoring is no greater than necessary to achieve these ends.

We join our sister circuits in concluding that certain defendants who have been convicted of drug trafficking offenses may properly be required to disclose the details of their personal finances as a condition of ***1222** supervised release. *See Brown,* 402 F.3d at 137(affirming financial disclosure condition imposed on defendant convicted of drug trafficking in part because "given this particular defendant's personal characteristics and history, the financial disclosure requirement is an effective monitoring-and hence deterring-device" and because "monitoring [the defendant's] finances will ... serve to protect the public from 'further crimes of the defendant' "); *United States [redacted] Melendez-Santana,* 353 F.3d 93, 107 (1st Cir.2003) (affirming financial disclosure condition imposed on a similarly situated defendant because it is related to the characteristics of the defendant and deters future criminal conduct), *overruled on other grounds by U.S. [redacted] Padilla,* 415 F.3d 211 (1st Cir.2005) (en banc); *United States [redacted] Behler,* 187 F.3d 772, 780 (8th Cir.1999) (affirming financial disclosure condition because "the district court understood that money and greed were at the heart of[the defendant's] drug distribution offenses and believed that monitoring [the defendant's] financial situation would aid in detecting any return to his former lifestyle of drug distribution"). Therefore the district court did not plainly err in imposing this condition.

III. Conclusion

Garcia and Plascencia-Alvarado were sentenced to a term that was within the range they agreed to in their Rule **11(c)(1)(C)** plea agreement, which was not contingent upon the guidelines. Consequently, we do not have jurisdiction under 18 U.S.C. §§ 3742(a)(1) or (a)(2) to review challenges to their sentences. Torres' supervised release drug testing condition, as construed by this court, is not improper, nor is the financial disclosure condition.

Garcia's and Plascencia-Alvarado's appeals are DISMISSED. Torres' sentence (including the conditions of supervised release) is AFFIRMED.

C.A.9 (Wash.),2007.
U.S. [redacted]. Garcia
507 F.3d 1213, 07 Cal. Daily Op. Serv. 13,202, 2007 Daily Journal D.A.R. 17,149

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Effective: July 27, 2006

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification
§ 16913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

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(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

CREDIT(S)

(Pub.L. 109-248, Title I, § 113, July 27, 2006, 120 Stat. 593.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2006 Acts. Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S35.

References in Text

This subchapter, referred to in subsecs. (d) and (e) originally read "this title", meaning Title I [§ 101 et seq.] of Pub.L. 109-248, July 27, 2006, 120 Stat. 590, known as the Sex Offender Registration and Notification Act, which enacted this subchapter; for complete classification, see Short Title note set out under 42 U.S.C.A. § 16901 and Tables.

NOTES OF DECISIONS

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1. Retroactive application

Defendant was required to register as a sex offender, pursuant to the Sex Offender Registration and Notification Act (SORNA), regardless of whether the Attorney General had adopted required rule specifying the applicability of the Act to sex offenders convicted before its enactment; defendant was required to register or update his registration under the existing state law of his residence. U.S. [redacted] Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⇦ 469(2)

Sex Offender Registration and Notification Act's (SORNA) requirement that sex offenders register and update their registration did not apply to defendants at the time of their indictments where their convictions pre-dated SORNA and they were indicted after SORNA's effective date, but before the Attorney General exercised his authority under SORNA and issued an interim rule that made it clear that SORNA applied to sex offenders regardless of when they were convicted; the indictments occurred in the brief window during which SORNA's scope remained undefined as

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to past offenders, and th[redacted] statute required the Attorney General to animate SORNA's provisions to previously convicted offenders. U.S. [redacted]. Kapp, M.D.Pa.2007, 487 F.Supp.2d 536. Statutes ⚿ 278.29

2. Constitutional delegation of authority

Provision of Sex Offender Registration and Notification Act (SORNA) which gave Attorney General authority to decide whether persons classified as sex offenders, who were unable to register, should be subject to the registration requirements, was not unconstitutional, in violation of the non-delegation doctrine, as applied to defendant, a previously-convicted sex offender; the delegation of authority to the Attorney General was not so broad as to be violative of the non-delegation doctrine, and defendant was not a person who was unable to register within the meaning of the provision. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

3. Procedural due process

Sex Offender Registration and Notification Act (SORNA) did not violate the procedural due process rights of defendant, a previously-convicted sex offender, by failing to give him actual notice that travel across state lines subjected him to criminal penalties; defendant had sufficient notice that failing to register was illegal. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

4. Substantive due process

Sex Offender Registration and Notification Act (SORNA) did not, by subjecting to the Act's requirements persons who were not in fact convicted of an offense listed as a qualifying sex offense, or whose conviction was set aside, violate the substantive due process rights of defendant, a previously-convicted sex offender; defendant fell squarely within the category of persons required to register, and his conviction had not been set aside. U.S. [redacted] Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

5. Standing

Previously-convicted sex offender who could allege no injuries traceable to the Sex Offender Registration and Notification Act's (SORNA) alleged violations of procedural and substantive due process did not have standing to challenge the constitutionality of the Act on such grounds. U.S. [redacted] Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Constitutional Law ⚿ 885

6. Ex post facto

Sex Offender Registration and Notification Act (SORNA), and the federal offense it created, of failing to register as a sex offender (FFR), did not violate the Ex Post Facto Clause by inflicting greater punishment on defendant, a previously-convicted sex offender, than was provided by law when he was convicted; Act's legislative history indicated that Congress's concern was with public safety rather than with a desire to further punish sex offenders, [redacted]nd the registration requirements were not so punitive as to negate Congress's intent that they be nonpunitive. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

7. Commerce clause

Sex Offender Registration and Notification Act (SORNA), and the federal offense it created, of failing to register as a sex offender (FFR), was a proper exercise of Congressional authority under the Commerce Clause; FFR had at [redacted]east a de minimis effect on interstate travel, since it regulated sex offenders who traveled across state lines. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

8. Venue

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Failing to register as a sex offender, pursuant to the Sex Offender Registration and Notification Act (SORNA), was a continuing offense, and therefore venue was proper in prosecution for traveling in interstate commerce and failing to register as a sex offender, in either [redacted], the state in which defendant's travel originated, or in Tennessee, the place to which defendant changed his residency and in which he failed to register; failure to register involved an element of interstate or foreign travel. U.S. [redacted] Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Criminal Law ⚿ 113

42 U.S.C.A. § 16913, 42 USCA § 16913

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Effective: July 27, 2006

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification
→ § 16911. Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves--

(i) use of a minor in a sexual performance;

requires 25 yrs registration

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(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and--

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

(A) Generally

Except as limited by subparagraph (B) or (C), the term " sex offense" means--

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

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(C) Offenses involving consensual sexual conduct

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term " specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

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(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

CREDIT(S)

(Pub.L. 109-248, Title I, § 111, July 27, 2006, 120 Stat. 591.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

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2006 Acts. Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S35.

References in Text

This subchapter, referred to in text, originally read "this title", meaning Title I [§ 101 et seq.] of Pub.L. 109-248, July 27, 2006, 120 Stat. 590, known as the Sex Offender Registration and Notification Act, which enacted this subchapter; for complete classification, see Short Title note set out under 42 U.S.C.A. § 16901 and Tables.

Chapter 109A of Title 18, referred to in par. (5)(A)(iii), is Sexual Abuse, 18 U.S.C.A. § 2241 et seq.

Chapter 110 of Title 18, referred to in par. (5)(A)(iii), is Sexual Exploitation and Other Abuse of Children, 18 U.S.C.A. § 2251 et seq.

Chapter 117 of Title 18, referred to in par. (5)(A)(iii), is Transportation for Illegal Sexual Activity and Related Crimes, 18 U.S.C.A. § 2421 et seq.

Section 115 of Public Law 105-119, referred to in par. (5)(A)(iv), (6), is cl. (i) of Pub.L. 105-119, Title I, § 115(a)(8)(C), Nov. 26, 1997, 111 Stat. 2466, which is set out as a note under 10 U.S.C.A. § 951.

NOTES OF DECISIONS

Generally 1
Commerce clause 6
Ex post facto 2
Policy safety regulation 5
Procedural due process 3
Substantive due process 4

1. Generally

Congress did not impermissibly delegate its constitutional legislative duties by providing, in Sex Offender Registration and Notification Act (SORNA), that Attorney General was to specify whether statute was applicable to offenders convicted prior to its enactment date, and prescribe rules for registration of offenders unable to comply with statutory requirements; Congress was merely authorizing executive branch to give advice to courts on question of retroactivity. U.S. [redacted]. Madera, M.D.Fla.2007, 474 F.Supp.2d 1257. Mental Health ⚿ 433(2)

2. Ex post facto

Congress did not violate ex post facto law clause of Constitution by passing Sex Offender Registration and Notification Act (SORNA), on grounds that registration requirements were additional punishment inflicted upon offender after he committed sexual offense; purpose of SORNA was civil, assurance of public safety, rather than penal, and ex post facto prohibition applied only to penal provisions. U.S. [redacted] Madera, M.D.Fla.2007, 474 F.Supp.2d 1257. Mental Health ⚿ 433(2)

Sex Offender Registration and Notification Act (SORNA), and the federal offense it created, of failing to register as a sex offender (FFR), did not violate the Ex Post Facto Clause by inflicting greater punishment on defendant, a previously-convicted sex offender, than was provided by law when he was convicted; Act's legislative history indicated that Congress's concern was with public safety rather than with a desire to further punish sex offenders, and the registration requirements were not so punitive as to negate Congress's intent that they be nonpunitive. U.S.

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[redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

3. Procedural due process

Sex Offender Registration and Notification Act (SORNA) did not violate procedural due process rights of convicted sex offender, by not providing for notice and hearing prior to publication of his name on offender registry or prior to being compelled to register as offender; since all convicted offenders were required to register, there was no need for hearings to consider circumstances of individual cases. U.S. [redacted]. Madera, M.D.Fla.2007, 474 F.Supp.2d 1257. Mental Health ⚿ 433(2)

Sex Offender Registration and Notification Act (SORNA) did not violate the procedural due process rights of defendant, a previously-convicted sex offender, by failing to give him actual notice that travel across state lines subjected him to criminal penalties; defendant had sufficient notice that failing to register was illegal. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

4. Substantive due process

Substantive due process rights of convicted sex offenders was not violated by Sex Offender Registration and Notification Act (SORNA), requiring that they register and disclose their whereabouts following release. U.S. [redacted]. Madera, M.D.Fla.2007, 474 F.Supp.2d 1257. Mental Health ⚿ 433(2)

5. Policy safety regulation

There was rational public safety basis for regulation of interstate commerce, underlying Sex Offender Registration and Notification Act (SORNA) requirements that released offenders report address changes to authorities, precluding claim that SORNA violated Commerce Clause. U.S. [redacted]. Madera, M.D.Fla.2007, 474 F.Supp.2d 1257. Mental Health ⚿ 433(2)

6. Commerce clause

Sex Offender Registration and Notification Act (SORNA), and the federal offense it created, of failing to register as a sex offender (FFR), was a proper exercise of Congressional authority under the Commerce Clause; FFR had at [redacted]east a de minimis effect on interstate travel, since it regulated sex offenders who traveled across state lines. U.S. [redacted]. Hinen, W.D.Va.2007, 487 F.Supp.2d 747. Mental Health ⚿ 433(2)

42 U.S.C.A. § 16911, 42 USCA § 16911

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42 U.S.C.A. § 16914 Page 1

Effective: July 27, 2006

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification
→ § 16914. Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

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(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

CREDIT(S)

(Pub.L. 109-248, Title I, § 114, July 27, 2006, 120 Stat. 594.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2006 Acts. Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S35.

42 U.S.C.A. § 16914, 42 USCA § 16914

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Effective: July 27, 2006

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 151. Child Protection and Safety
Subchapter I. Sex Offender Registration and Notification
Part A. Sex Offender Registration and Notification
→ § 16915. Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section. The full registration period is--

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by--

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

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(2) Period

In the case of--

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

(3) Reduction

In the case of--

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

CREDIT(S)

(Pub.L. 109-248, Title I, § 115, July 27, 2006, 120 Stat. 595.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2006 Acts. Statement by President, see 2006 U.S. Code Cong. and Adm. News, p. S35.

References in Text

This subchapter, referred to in subsec. (b)(2)(B) originally read "this title", meaning Title I [§ 101 et seq.] of Pub.L. 109-248, July 27, 2006, 120 Stat. 590, known as the Sex Offender Registration and Notification Act, which enacted this subchapter; for complete classification, see Short Title note set out under 42 U.S.C.A. § 16901 and Tables.

42 U.S.C.A. § 16915, 42 USCA § 16915

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--- F.3d ----, 2007 WL 4510264 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

H

U.S. [redacted]. Rakes
C.A.10 (Utah),2007.
Only the Westlaw citation is currently available.
United States Court of Appeals,Tenth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Joe RAKES, Defendant-Appellant.
No. 06-4208.

Dec. 26, 2007.

Background: Defendant was convicted in the United States District Court for the District of Utah of conspiring to impede or injure an officer, and was sentenced to 63 months' imprisonment, and he appealed.

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

(1) evidence was sufficient to support conviction;

(2) court did not violate rule of criminal procedure requiring court to provide the parties with any information on which it would rely in sentencing;

(3) any violation of rule of criminal procedure governing pleas was harmless error; and

(4) applicable sentencing guideline was guideline for threatening or harassing communications.

Affirmed.

[1] Criminal Law 110 ⇦0

110 Criminal Law
In assessing challenges to the sufficiency of the evidence to support a conviction, the court of appeals reviews the evidence presented de novo, asking whether, viewing it in the light most favorable to the government, as the prevailing party, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

[2] Criminal Law 110 ⇦0

110 Criminal Law
The evidence of the existence of an agreement between defendant and another person to prevent the victim, a prosecutor, from discharging her duties by sending her a threatening letter was sufficient to support defendant's conviction for conspiring to impede or injure an officer; although coconspirator presented alternative and conflicting testimony about nature of her involvement in alleged conspiracy, including statements suggesting she was coerced by defendant, by voices in her head, or perhaps by someone else, one of the accounts she offered did involve admission of her knowing and voluntary participation in scheme with defendant, and friend of defendant, who read the letter at defendant's apartment, testified defendant told him that he and coconspirator had written letter. 18 U.S.C.A. § 372.

[3] Criminal Law 110 ⇦0

110 Criminal Law
In prosecution for conspiring to impede or injure an officer, district court did not violate rule of criminal procedure requiring sentencing court to provide the parties with any information on which it would rely in sentencing by failing to disclose at hearing on parties' plea agreement that court had received a victim impact letter from the prosecutor who was the victim in the case; the court did not sentence defendant at the hearing on the plea agreement, and instead, concluded the hearing by advising the parties that it was rejecting the agreement's recommended sentence, and would not sentence defendant that day in accord with the agreement. Fed.Rules Cr.Proc.Rule 32(i)(1)(B), 18 U.S.C.A.

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--- F.3d ----, 2007 WL 4510264 (C.A.10 (Utah))
(Cite as: --- F.3d ----)

[4] Criminal Law 110 ⇦0

110 Criminal Law
In prosecution for conspiring to impede or injure an officer, any violation of rule of criminal procedure governing pleas in district court's failure to disclose at hearing at which court rejected recommended sentence in parties' plea agreement that court had received victim impact letter from victim in the case was harmless error; after defendant learned of letter, he asked court to reconsider rejection of plea agreement, and court denied reconsideration, stating it would have rejected agreement regardless of letter for reasons set forth on record, including court's assessment that guidelines advisory sentence for crime to which defendant agreed to plead guilty was at least double the parties' agreed sentence, and neither party had offered persuasive reason for such a disparity. Fed.Rules Cr.Proc.Rule 11(h), 18 U.S.C.A.

[5] Sentencing and Punishment 350H ⇦0

350H Sentencing and Punishment
For purposes of defendant's sentencing for conspiring to impede or injure an officer, an offense for which no sentencing guidelines range was designated, most analogous guideline, and thus, applicable guideline, was guideline for threatening or harassing communications, rather than for obstructing or impeding an officer; indictment charged conspiracy to threaten and intimidate federal prosecutor by writing letter with threatening language, listing street on which victim lived, and mailing letter to victim, and although defendant sought to impede prosecution of members of white supremacy group, he intended to do so by means of premeditated and comparatively complex scheme of intimidation rather than by act of simple assault, and case proven at trial centered around threatening letter. U.S.S.G. §§ 2A2.4, 2A6.1(a)(1), 18 U.S.C.A.

Appeal from the United States District Court for the District of Utah (D.C. No. 2:05-CR-131-TS).

Jeremy M. Delicino, Salt Lake City, Utah, for Defendant-Appellant.
Jack B. Haycock, Assistant United States Attorney (Thomas E. Moss, United States Attorney, with him on the brief), Pocatello, Idaho, for Plaintiff-Appellee.

Before LUCERO, BALDOCK, and GORSUCH, Circuit Judges.
GORSUCH, Circuit Judge.
***1** Joe Rakes challenges his conviction and resulting sentence arising from an alleged conspiracy to impede the investigation and prosecution of a white supremacy group, the Soldiers of Aryan Culture. Specifically, he argues that (1) the evidence presented at trial was insufficient to establish a conspiracy between him and another participant in the alleged scheme; (2) the district court improperly rejected his plea agreement based on an undisclosed victim impact letter; and (3) the district court applied the wrong provision of the United States Sentencing Guidelines ("Guidelines") in calculating his sentence. While none of these arguments is without force, we ultimately conclude that none merits reversal under our governing standards of review.

I

A

In March 2004, an Assistant United States Attorney for the District of Utah in Salt Lake City received a threatening letter stating, "You stupid bitch! It is because of you that my brothers are in jail for the Rico. I know you live on the [street name redacted]. *We will get you.* til the casket drops."The letter apparently referred to an ongoing racketeering prosecution under the Racketeer Influenced and Corrupt Organization Act ("RICO") that the victim prosecutor was pursuing against members of the Soldiers of Aryan Culture. As a result of the letter, the prosecutor moved out of her home for a month, was assigned a United States Marshals detail to protect her for a time, and was eventually removed from the prosecution in question.

The Federal Bureau of Investigation's subsequent investigation of the letter led to a woman named April Dowding, a friend of two of the RICO

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defendants who was known to refer to them as her brothers. Ms. Dowding identified Mr. Rakes as being involved in writing or mailing the threatening letter, as did other witnesses, including Laura Scott and Doug Errett.

The government indicted Mr. Rakes in March 2005 in the District of Utah on two counts: mailing a threatening communication, 18 U.S.C. § 876, and conspiring to impede or injure an officer, 18 U.S.C. § 372. After initially pleading not guilty, Mr. Rakes agreed to enter a plea of guilty to the lesser offense misprision of a felony, 18 U.S.C. § 4, in exchange for an agreement from the government that the appropriate sentence was 9 months imprisonment, below the 18 to 24 months suggested by Section 2X4.1 of the advisory Guidelines. *See* Fed.R.Crim.P. **11(c)(1)(C)**. The court conditionally accepted the change of plea, subject to its receipt of a presentence report and subsequent sentencing hearing.

Prior to sentencing, the district court received a victim impact letter, *see*18 U.S.C. § 3771(a)(4), from the victim prosecutor but did not disclose the existence of the letter either to defense counsel or counsel for the government. At sentencing, the district court opened the proceeding by expressing doubt about the parties' recommended sentence of nine months, remarking that it would like them to explain how such a sentence would be justifiable even though it represented only half what the advisory Guidelines recommended as a minimum sentence. After argument, the district court, apparently seeing no convincing reason for a below-Guidelines sentence, reversed its prior conditional approval of the plea agreement, indicated its belief that a more substantial sentence was merited, and explained that it was concerned with

***2** the very real victim impact presented by this case. This is a serious matter. The impact on a respected Assistant U.S. Attorney in her role as an Assistant U.S. Attorney is very real. Furthermore, the impact on her as an individual, on her family is very real. And the Court is concerned about the message that might be sent if this matter is not properly punished.

R. III at 10-11. With the plea agreement's recommended sentence rejected, the district court advised Mr. Rakes of his right to withdraw his guilty plea and proceed to trial, *see*Fed.R.Crim.P. 11(c)(5), a right Mr. Rakes decided to exercise.

B

At trial, Ms. Dowding, the government's primary witness, testified that the threatening letter was created in Mr. Rakes's apartment but otherwise offered contradictory factual scenarios concerning its genesis, stating variously that (1) Mr. Rakes threatened her into writing the letter; (2) she could have been threatened by someone else or the voices in her head; and (3) she wrote the letter willingly, with the help of Mr. Rakes or at his suggestion, because she was upset about the treatment of her " brothers" in the white supremacy group who were charged in the RICO case and were in jail.

Laura Scott was similarly equivocal in recalling her own involvement with the letter. She did testify, however, that she was a friend of Mr. Rakes and, at his direction and borrowing his car, went to the library to look up the address of the victim prosecutor. Ms. Scott brought the information back to Mr. Rakes at his apartment, where she saw Ms. Dowding was writing and had paper and envelopes.

Doug Errett testified that he was also a friend of Mr. Rakes, having known him in prison where they were both members of the Fourth Reich, a white supremacist prison gang. Mr. Errett stated that in February 2004 he was at Mr. Rakes's residence with Mr. Rakes and Ms. Dowding, where he saw the letter in question. At that time Mr. Rakes told him he and Ms. Dowding had written the letter to the prosecutor on the Soldiers of Aryan Culture case.

At the close of the government's case, Mr. Rakes moved for acquittal on both counts, *see* Fed.R.Crim.P. 29, which the district court granted as to Count I, mailing a threatening communication, but denied as to Count II, conspiring to impede or injure an officer. The jury thereafter found Mr. Rakes guilty of the surviving count, and the district court denied his renewed Rule 29 motion. Before

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sentencing, Mr. Rakes filed a motion for disclosure of any victim impact statements pursuant to Rule 32 of the Federal Rules of Criminal Procedure, which the district court granted, providing both parties the letter it had received from the victim prosecutor. Because the district court had not disclosed the letter at the plea agreement stage, Mr. Rakes moved the district court to reconsider the plea agreement and recuse itself so another judge could handle the inquiry. The district court denied the motion.

***3** In preparing its presentence report, the probation office encountered a different sort of complication. Because Mr. Rakes's offense, conspiracy to impede or injure an officer, 18 U.S.C. § 372, does not have an assigned Sentencing Guidelines section, the probation office was required to analogize to another Guidelines section and ultimately chose to employ Section 2A6.1(a)(1), which covers certain crimes involving threatening or harassing communications and has a base offense level of 12. Mr. Rakes objected, arguing that the most analogous guideline was Section 2A2.4, relating to obstructing or impeding a law enforcement officer, with a base offense level of 10. The district court overruled Mr. Rakes's objection and, employing Section 2A6.1(a)(1), sentenced Mr. Rakes to 63 months imprisonment.[FN1]

II

[1][2] On appeal, Mr. Rakes first contends that the government presented insufficient evidence at trial on an essential element of his crime-namely, the existence of an agreement between him and another person to prevent the victim from discharging her duties by the use of force, violence, or intimidation. In assessing such sufficiency challenges, we review the evidence presented *de novo,* asking whether, viewing it in the light most favorable to the government, as the prevailing party, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In so doing, we do not weigh conflicting evidence or credibility, but ask only whether the government's evidence, credited as true, would establish the elements of the crime. *United States* [redacted] *Delgado-Uribe,* 363 F.3d 1077, 1081 (10th Cir.2004). While our standard of review is deferential to be sure, we will not uphold a conviction obtained by piling inference upon inference, and the evidence supporting a conviction must do more than raise a mere suspicion of guilt. *United States* [redacted] *Valadez-Gallegos,* 162 F.3d 1256, 1262-63 (10th Cir.1998).

Mr. Rakes argues that Ms. Dowding could not have been a willing coconspirator with him because she was threatened into writing the letter. *See United States* [redacted] *Williamson,* 53 F.3d 1500, 1519 (10th Cir.1995) (requiring some evidence that an alleged co-conspirator knowingly and voluntarily joined the conspiracy). This argument is, of course, addressed solely to whether a conspiracy existed between Mr. Rakes and Ms. Dowding and does not contemplate the possibility that, even without Ms. Dowding, the jury could have found a voluntary agreement between Mr. Rakes and Ms. Scott or perhaps Mr. Errett. Because in its briefing before us the government also pursues the theory that the conspiracy was primarily between Mr. Rakes and Ms. Dowding, and because we agree that sufficient evidence of such a conspiracy was presented, we accept for our current purposes Mr. Rakes's premise that the conspiracy was only between Ms. Dowding and himself.

Viewing the case in this light, we begin by readily acknowledging that Ms. Dowding presented alternative and conflicting testimony about the nature of her involvement in the alleged conspiracy, including statements suggesting she was coerced by Mr. Rakes, by voices in her head, or perhaps by someone else. But one of the accounts she offered did involve an admission of her knowing and voluntary participation in a scheme with Mr. Rakes. In our judicial system, the jury, as factfinder, was charged with the task of sifting the wheat from the chaff, discerning which (if any) of Ms. Dowding's accounts merited belief. *See Young* [redacted] *Sirmons,* 486 F.3d 655, 666 (10th Cir.2007) ("[It is] the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts."(quoting *Jackson* [redacted] 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Of course, a jury is not free to credit

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testimony beyond the pale of reason, *see Parker* [redacted] *Scott,* 394 F.3d 1302, 1315 (10th Cir.2005) (distinguishing inconsistent testimony from that which is "inherently implausible"), but we are not allowed to substitute our judgment for that of the jury when it comes to deciding which rationally plausible account of the facts to credit, *see Young,* 486 F.3d at 666.

***4** Though the question whether Ms. Dowding was worthy of belief in any of her accounts is not one that can be reflexively dismissed, neither can we say that no rational jury could have credited her testimony that she wrote the letter willingly, with the help of, or at the suggestion of, Mr. Rakes. It seems to us that the jury could have reasonably concluded that this particular version of events was more believable than Ms. Dowding's alternative explanations, and that her alternative explanations were calculated to minimize her own culpability and rationalize her willing involvement with Mr. Rakes. Bolstering the plausibility of such a conclusion is the fact that Ms. Dowding was not the sole source of evidence about the agreement between herself and Mr. Rakes. Mr. Errett, who read the threatening letter at Mr. Rakes's apartment, testified that Mr. Rakes told him that he and Ms. Dowding had written the letter. Ms. Scott likewise testified that, after she looked up the address of the victim at the library, she brought it back to Mr. Rakes at his apartment, where Ms. Dowding, under no apparent duress, was writing and had paper and envelopes. To the extent that the jury believed either or both of these witnesses, their testimony tended to corroborate, and thus help make rationally plausible, Ms. Dowding's version of the events in which she and Mr. Rakes knowingly and voluntarily conspired.

While this case surely required the jury to pick and choose among competing versions of events, with at least three witnesses testifying that Ms. Dowding and Mr. Rakes worked together on the threat letter we cannot say, as we must for Mr. Rakes to prevail, that no rational trier of fact could have found beyond a reasonable doubt that Ms. Dowding and Mr. Rakes entered into an agreement aimed at preventing the victim prosecutor from performing her job by means of force, violence, or intimidation.

III

[3] Mr. Rakes next contends that the district court committed reversible error by failing to disclose the victim impact letter during the course of its hearing on the parties' plea agreement.[FN2] In aid of his argument, Mr. Rakes rests primarily on Rule 32 of the Federal Rules of Criminal Procedure, which requires a sentencing court to provide both parties with any information on which it will rely in sentencing and give them a reasonable opportunity to comment on the information. *See*Fed.R.Crim.P. 32(i)(1)(B). Under our case law, failing to disclose evidence on which the court relied in sentencing may result in a remand for resentencing. *See United States* [redacted] *Alvarado,* 909 F.2d 1443, 1444-46 (10th Cir.1990).

We agree with Mr. Rakes and the government that it would have been better for the district court to have provided the parties with copies of the victim impact letter prior to its disposition of the plea agreement. Doing so would have made more transparent the district court's concerns about whether the plea agreement's proposed sentence adequately accounted for the crime's impact on the victim prosecutor and would have allowed the parties to address those concerns more intelligently. But, by its plain terms, Rule 32(i)(1)(B) obligates the district court to provide the parties advance access to information on which it "will rely in sentencing." And the harm it seeks to safeguard against is sentencing based on evidence that the parties have not had reasonable notice of and opportunity to address. *See United States* [redacted] *Begay,* 117 Fed.Appx. 682, 683 (10th Cir.2004) (noting Rule 32 seeks "to ensure that sentencing is based on reliable facts found by the court itself after deliberation").[FN3] Here, however, the court did not sentence Mr. Rakes. Instead, it concluded the hearing by advising the parties that it would *not* sentence Mr. Rakes that day in accord with their plea agreement. Had the court proceeded to issue something other than the parties' agreed sentence without first affording them a meaningful opportunity to review and comment on the victim's letter, Rule 32(i)(1)(B) surely would have been implicated and we would have before us a very different case. As it is, however, we cannot say the

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rule, by its plain terms, was violated, or that the harm it seeks to avoid was implicated. In fairness to the district court we must also note that, although the parties did not have the victim's letter, they were at least on notice of its existence and could have sought its production. The presentence report prepared for the plea hearing explicitly stated, under "Victim Impact," that "[the victim] is preparing a statement that will be submitted directly to the Court."P.S.R. of Oct. 5, 2005 at ¶ 11.

***5** [4] Beyond Rule 32, there remains in our view a distinct and even more germane question. A district court enjoys substantial discretion in deciding whether to accept or **reject** a plea agreement under Rule 11. *See*Fed.R.Crim.P. 11(c)(3); *United States v. Robertson,* 45 F.3d 1423, 1438 (10th Cir.1995); *United States v. Carrigan,* 778 F.2d 1454, 1461-62 (10th Cir.1985). But that discretion is not without limit. *See Robertson,* 45 F.3d at 1438. While a defendant has no absolute right to have his plea agreement accepted, in our supervisory capacity we have placed some boundaries on the district court's discretion-requiring district courts, for example, to articulate reasons on the record if and when they decide to **reject** such agreements in order, among other things, "to insure district courts exercise sound judicial discretion."*Id.* Though Mr. Rakes's brief primarily discusses Rule 32, we also understand him to suggest that, even if Rule 32 is not implicated, a district court cannot exercise sound judicial discretion under Rule 11 in rejecting a plea agreement when it acts on the basis of undisclosed evidence, and this strikes us as a very different and more appropriately targeted question.

The parties, however, have directed us to no authority on this issue and, at the end of the day, we believe this case is properly resolved without reaching it. Rule 11 expressly provides that, even if the rules associated with the acceptance or rejection of a plea agreement are violated, any such error is to be deemed "harmless error if it does not affect substantial rights."Fed.R.Crim.P. 11(h); *see also* Fed.R.Crim.P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). On balance, we think this mandate applies here.

After Mr. Rakes became aware of the victim impact letter, he asked the district court to reconsider its decision to **reject** the parties' plea agreement, arguing that the court's decision had improperly relied on undisclosed information. The district court denied reconsideration, citing, among other grounds, the fact that it "would have rejected the plea agreement regardless of the letter for the reasons set forth plainly on the record."Sealed Mem. Decision and Order, at 5. Those reasons included the district court's assessment that the Guidelines advisory sentence for the crime to which Mr. Rakes agreed to plead guilty was at least double that of the parties' agreed sentence and neither party had offered a persuasive reason for such a disparity under the facts and circumstances of this case. Before us on appeal, Mr. Rakes likewise offers us no reason to doubt the district court's assessment, making no attempt to show why such a disparity would have been warranted. Neither does he identify, nor did he state in his motion to reconsider, what information in the victim's letter was incorrect or what arguments addressing it he would have made to the district court. Without being given *some* reason to think that a sentencing court would have reached a different outcome in the disposition of the plea agreement had the letter been disclosed, we are compelled to conclude that, even taking the district court's failure to disclose the letter to be error, it was harmless error.

IV

***6** [5] After trial, the district court sentenced Mr. Rakes on the sole surviving charge, 18 U.S.C. § 372 , in accord with Section 2A6.1(a)(1), the guideline for threatening or harassing communications. Mr. Rakes argues that the most analogous guideline is instead Section 2A2.4, pertaining to obstructing or impeding an officer, and that his sentence was therefore in error.

In approaching this dispute, we note at the outset that it is common ground between the parties that the Sentencing Guidelines Manual does not specify a sentencing range for Mr. Rakes's offense, and so the district court was obliged to "apply the most analogous offense guideline [or,][i]f there is not a

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EFTA00191962

UNITED STATES of America, Plaintiff–Appellee,

v.

Justin EVANS, Defendant–Appellant.

No. 06–10907.

United States Court of Appeals, Eleventh Circuit.

Jan. 30, 2007.

Background: Defendant was convicted in the United States District Court for the Southern District of Florida, No. 05-20444-CR-PAS, Patricia A. Seitz, J., of enticing a minor to engage in a commercial sex act, and enticing a minor to engage in prostitution, and he appealed.

Holdings: The Court of Appeals, Bowman, Circuit Judge, sitting by designation, held that:

(1) even though all of defendant's conduct involving child occurred solely within the state of Florida, defendant's conduct satisfied interstate-commerce element of Trafficking Victims Protection Act (TVPA) provision prohibiting the enticing of a minor to engage in a commercial sex act, and

(2) defendant's use of telephones and cellular telephones, even without evidence that the calls he made were routed through an interstate system, was sufficient to satisfy interstate-commerce element of statute prohibiting enticing a minor to engage in prostitution.

Affirmed.

1. Criminal Law ⇐1139, 1149

A district court's denial of a motion to dismiss an indictment is generally reviewed for abuse of discretion; however, when the motion to dismiss the indictment challenges the court's subject matter jurisdiction, appellate court reviews *de novo* the district court's interpretation and application of the statutory provisions concerning the court's subject matter jurisdiction.

2. Criminal Law ⇐1139

Whether a statute is unconstitutional as applied is a question of law subject to *de novo* review.

3. Commerce ⇐82.6

Infants ⇐13

Even though all of defendant's conduct involving child occurred solely within the state of Florida, defendant's conduct satisfied interstate-commerce element of Trafficking Victims Protection Act (TVPA) provision prohibiting the enticing of a minor to engage in a commercial sex act; defendant's enticement of child to commit prostitution had the capacity, when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity. 18 U.S.C.A. § 1591(a).

4. Commerce ⇐82.6

Infants ⇐13

Trafficking Victims Protection Act (TVPA) provision prohibiting the enticing of a minor to engage in a commercial sex act does not require knowledge by a defendant that his actions are in or affecting interstate commerce. 18 U.S.C.A. § 1591(a)(1).

5. Commerce ⇐7(2)

Under Congress's Commerce Clause authority, Congress is empowered to regulate and protect the instrumentalities of interstate commerce even though the threat may come only from intrastate activities. U.S.C.A. Const. Art. 1, § 8, cl. 3.

6. Commerce ⇐59

Telephones and cellular telephones are instrumentalities of interstate commerce for purposes of Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

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7. Commerce ⇐82.10
Prostitution ⇐15

Defendant's use of telephones and cellular telephones, even without evidence that the calls he made were routed through an interstate system, was sufficient to satisfy interstate-commerce element of statute prohibiting enticing a minor to engage in prostitution. 18 U.S.C.A. § 2422(b).

Faith Mesnekoff and Richard C. Klugh, Jr., Fed. Pub. Defenders, Jacqueline Esther Shapiro, Asst. Fed. Pub. Def., Miami, FL, Kathleen M. Williams, Fed. Pub. Def., West Palm Beach, FL, for Evans.

Lisa T. Rubio, Dawn Bowen, Anne R. Schultz, Asst. U.S. Atty., Miami, FL, for U.S.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, HULL and BOWMAN,* Circuit Judges.

BOWMAN, Circuit Judge:

Justin Evans appeals his convictions for enticing a minor to engage in a commercial sex act in violation of 18 U.S.C. § 1591(a)(1), and enticing a minor to engage in prostitution in violation of 18 U.S.C. § 2422(b). Evans asserts that the district court erred in denying his motion to dismiss the indictment. Specifically, Evans challenges the constitutionality of § 1591(a)(1) and § 2422(b) as applied to his purely local actions and the sufficiency of the stipulated facts to satisfy the jurisdictional interstate-commerce elements of the offenses. After review and oral argument, we affirm.

I.

A federal grand jury indicted Evans and two co-defendants for their roles in operating a child prostitution ring in Miami–Dade County, Florida. Evans filed a motion to dismiss the indictment, contending that the evidence upon which the government planned to rely would not satisfy the interstate-commerce element of the statutes under which he was charged. Thereafter, the parties agreed to proceed by way of a conditional guilty plea. Evans pleaded guilty to violating 18 U.S.C. §§ 1591(a)(1) and 2422(b), but reserved his right to pursue his motion to dismiss the indictment. *See* Fed.R.Crim.P. 11(a)(2).

The parties agreed to the following relevant facts, either in the Factual Proffer to Support the Guilty Plea or at the hearing on the motion to dismiss the indictment. From December 2004 until May 2005, a fourteen-year-old girl ("Jane Doe") worked for Evans as a prostitute in Miami–Dade County. Evans arranged "dates" for Jane Doe at local hotels, and Jane Doe gave the money she earned on these dates to Evans. To inform Jane Doe of dates that he had arranged, Evans called Jane Doe on a cellular telephone that she had acquired from him. Evans also gave Jane Doe's cellular telephone number to customers and told Jane Doe to arrange dates when customers called. During the dates, Evans called Jane Doe on the cellular telephone to "check up on her." Government's Sur–Reply to Motion to Dismiss at 3. Evans supplied Jane Doe with condoms for use on the dates. The condoms were usually Lifestyle brand, which are manufactured overseas, imported into Georgia, and then distributed throughout the United States. In February 2005, Jane Doe was hospitalized for eleven days, during

* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

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which time she was diagnosed with AIDS. A few days after Jane Doe's release from the hospital, Evans called her on a land-line telephone and induced her to resume her work as a prostitute for him. Jane Doe worked for Evans until May 2005, when she was again hospitalized for AIDS treatment.

The district court determined that Evans's conduct satisfied the "in or affecting interstate or foreign commerce" element of § 1591(a)(1) and the "using ... any facility or means of interstate or foreign commerce" element of § 2422(b). Accordingly, the district court denied Evans's motion to dismiss the indictment. Evans appeals.

II.

[1, 2] Generally, we review a district court's denial of a motion to dismiss an indictment for abuse of discretion. *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir.1997), *cert. denied*, 523 U.S. 1060, 118 S.Ct. 1389, 140 L.Ed.2d 648 (1998). When the motion to dismiss the indictment challenges the court's subject matter jurisdiction, however, "we review *de novo* the district court's interpretation and application of the statutory provisions concerning the court's subject matter jurisdiction." *United States v. McPhee*, 336 F.3d 1269, 1271 (11th Cir.2003); *see also United States v. Drury*, 396 F.3d 1303, 1312 (11th Cir.) (applying a *de novo* standard of review in determining whether the evidence was sufficient to satisfy the interstate-commerce element of 18 U.S.C. § 1958(a)), *cert. denied*, — U.S. ——, 126 S.Ct. 336, 163 L.Ed.2d 48 (2005). Whether a statute is unconstitutional as applied is also a question of law subject to *de novo* review. *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir.) (*en banc*), *cert. denied*, — U.S. ——, 126 S.Ct. 368, 163 L.Ed.2d 77 (2005).

A.

[3] Count One of the indictment charged Evans with violating 18 U.S.C. § 1591(a)(1), which imposes punishment on anyone who "knowingly *in or affecting interstate or foreign commerce*, ... recruits, entices, harbors, transports, provides, or obtains by any means a person ... knowing ... 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)(1) (emphasis added). Evans argues that because all of his conduct involving Jane Doe occurred solely within the state of Florida, it cannot supply the necessary factual predicate for the interstate-commerce element of § 1591(a)(1). We disagree.

Pursuant to authority conveyed by the Commerce Clause of the United States Constitution, "Congress has the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005). The Supreme Court has interpreted this power broadly to include the "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* "[W]here Congress has attempted to regulate (or eliminate) an interstate market, *Raich* grants Congress substantial leeway to regulate purely intrastate activity (whether economic or not) that it deems to have the capability, in the aggregate, of frustrating the broader regulation of interstate economic activity." *United States v. Maxwell*, 446 F.3d 1210, 1215 (11th Cir.), *cert. denied*, — U.S. ——, 127 S.Ct. 705, 166 L.Ed.2d 545 (2006). Thus, in *Raich*, the Supreme Court upheld the application of the federal Controlled Substances Act ("CSA") to the purely intrastate growth and use of marijuana for medical purposes. 545 U.S. at 9, 125 S.Ct. 2195. The

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Court found that the CSA created a comprehensive framework for regulating controlled substances and that Congress had a rational basis to conclude that intrastate conduct could substantially affect its ability to regulate interstate commerce. *Id.* at 30, 32, 125 S.Ct. 2195.

Applying *Raich*, our Court recently rejected arguments that purely intrastate conduct could not be prosecuted under the federal Child Pornography Prevention Act of 1996 ("CPPA"). First, in *Maxwell*, we held that 18 U.S.C. § 2252A(a)(5)(B) was not unconstitutional as applied to a defendant's intrastate possession of child pornography, even though no evidence indicated that the defendant's conduct was likely to impact interstate commerce. 446 F.3d at 1217–19. We noted that the CPPA is part of a comprehensive regulatory scheme criminalizing, *inter alia*, the production, possession, and sale of child pornography and that Congress could rationally conclude that the cumulative effect of local possession of child pornography would substantially affect the interstate commerce that Congress was seeking to eliminate. *Id.* at 1217–19. Similarly, in *United States v. Smith*, we rejected the argument that 18 U.S.C. § 2251(a) was unconstitutional as applied to the intrastate production of child pornography. 459 F.3d 1276, 1284–85 (11th Cir.2006), *cert. denied*, 75 U.S.L.W. 3352 (U.S. Jan. 8, 2007) (No. 06–7780). We reasoned that § 2251(a), like § 2252A(a)(5)(B), is part of a comprehensive regulatory scheme that could be frustrated by purely intrastate activity considered in the aggregate. *Id.* at 1285.

We have no difficulty concluding that *Raich*, *Maxwell*, and *Smith* foreclose Evans's challenge to the constitutionality of § 1591(a)(1) as applied to his activities occurring solely within Florida. Section 1591 was enacted as part of the Trafficking Victims Protection Act of 2000 ("TVPA"), Pub.L. No. 106–386, 114 Stat. 1464 (codified as amended in scattered titles of U.S.C.). Like the CSA and the CPPA, the TVPA is part of a comprehensive regulatory scheme. The TVPA criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain.[1] Congress recognized that human trafficking, particularly of women and children in the sex industry, "is a modern form of slavery, and it is the largest manifestation of slavery today." 22 U.S.C. § 7101(b)(1); *see also id.* at § 7101(b)(2), (4), (9), (11). Congress found that trafficking of persons has an aggregate economic impact on interstate and foreign commerce, *id.* § 7101(b)(12), and we cannot say that this finding is irrational.

[4] Evans's enticement of Jane Doe to commit prostitution, even though his actions occurred solely in Florida, had the capacity when considered in the aggregate with similar conduct by others, to frustrate Congress's broader regulation of interstate and foreign economic activity. As noted by the district court, "While [Evans's] activities may be minor in the national and international market of trafficking children for commercial sex acts, his acts contribute to the market that Congress'[s] comprehensive scheme seeks to stop." Order of Nov. 23, 2005, at 10. Evans's use of hotels that served interstate travelers and distribution of condoms that traveled in interstate commerce are further evidence that Evans's conduct substantially affected interstate commerce. *See United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (holding that evidence that "pimps

1. Section 1591 does not criminalize all acts of prostitution (a vice traditionally governed by state regulation). Rather, its reach is limited to sex trafficking that involves children or is accomplished by force, fraud, or coercion. 18 U.S.C. § 1591(a).

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furnished their prostitutes with condoms manufactured out of state ... supports a finding that the activities of the enterprise affected interstate commerce"), *vacated on other grounds*, 544 U.S. 902, 125 S.Ct. 1617, 161 L.Ed.2d 275, *opinion reinstated*, 412 F.3d 1251 (11th Cir.), *cert. denied*, —— U.S. ——, 126 S.Ct. 591, 163 L.Ed.2d 492 (2005). Therefore, Evans's conduct sufficiently satisfies the interstate-commerce element of 18 U.S.C. § 1591(a) and his as-applied constitutional challenge fails.[2]

B.

Count Four of the indictment charged Evans with violating 18 U.S.C. § 2422(b), which imposes punishment on anyone who, "*using the mail or any facility or means of interstate or foreign commerce, ...* knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution." 18 U.S.C. § 2422(b) (emphasis added). Evans argues that the government did not establish § 2422(b)'s interstate-commerce element because, although Evans admitted using both a cellular telephone and a land-line telephone to entice Jane Doe to engage in prostitution, no evidence was presented that his intrastate calls were routed through interstate channels. This argument is without merit.

[5–7] Under Congress's Commerce Clause authority, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce ... even though the threat may come only from intrastate activities." *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Telephones and cellular telephones are instrumentalities of interstate commerce. *See Pipkins*, 378 F.3d at 1295; *Ballinger*, 395 F.3d at 1226. Ev-

2. At oral argument, Evans's counsel asserted that the term "knowingly" modifies the interstate-commerce element of 18 U.S.C. § 1591(a) and that the government was therefore required to prove that Evans knew that his actions were in or affecting interstate or foreign commerce. This argument was not made to the district court or raised in Evans's brief on appeal, and we would ordinarily deem it waived. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1256 n. 6 (11th Cir.2005) (holding that a statutory-interpretation argument raised for the first time at oral argument and not raised in the district court or in appellate briefs was waived); *United States* [redacted] *Silvestri*, 409 F.3d 1311, 1338 n. 18 (11th Cir.) ("Under the law of this Circuit, an issue not raised in a party's initial appellate brief is considered waived, and the party is prohibited from raising the issue later in the appeal."), *cert. denied*, —— U.S. ——, 126 S.Ct. 772, 163 L.Ed.2d 598 (2005); *see also* Plea Agreement at 4 ("This reservation of the defendant's right to appeal is limited to arguments that are raised in district court."). Because this argument might be regarded as a challenge to our jurisdiction, however, we briefly address it.

We are unaware of any court that has adopted the narrow reading of § 1591(a) urged by Evans. Nor is there anything in the legislative history of § 1591 suggesting that Congress intended the statute to reach only those sex traffickers who knew they were acting in or affecting interstate or foreign commerce. The Supreme Court has directed that "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute." *United States* [redacted] *Feola*, 420 U.S. 671, 677 n. 9, 95 S.Ct. 1255, 43 L.Ed.2d 541 (1975); *see also Smith*, 459 F.3d at 1287–89 (applying plain error standard of review and rejecting the argument that the term "knowingly" applies to the interstate-commerce element of 18 U.S.C. § 2252A(a)(5)(B)); *United States* [redacted] *Darby*, 37 F.3d 1059, 1067 (4th Cir.1994) ("Numerous cases have held that criminal statutes based on the government's interest in regulating interstate commerce do not generally require that an offender have knowledge of the interstate nexus of his actions."), *cert. denied*, 514 U.S. 1097, 115 S.Ct. 1826, 131 L.Ed.2d 747 (1995). Accordingly, we reject Evans's request to construe § 1591(a) as requiring knowledge by a defendant that his actions are in or affecting interstate commerce.

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ans's use of these instrumentalities of interstate commerce alone, even without evidence that the calls he made were routed through an interstate system, is sufficient to satisfy § 2422(b)'s interstate-commerce element. *Accord United States v. Gilbert*, 181 F.3d 152, 158–59 (1st Cir.1999) (citing cases and ruling that the intrastate use of a telephone provides a sufficient basis for jurisdiction based on interstate commerce even absent evidence that the call is routed through an interstate system); *United States v. Weathers*, 169 F.3d 336, 341 (6th Cir.) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce. Similarly, cellular telephones, even in the absence of evidence that they were used to make interstate calls, have been held to be instrumentalities of interstate commerce." (citations and emphasis omitted)), *cert. denied*, 528 U.S. 838, 120 S.Ct. 101, 145 L.Ed.2d 85 (1999). Thus, the district court did not err in determining that § 2422(b) reached Evans's conduct and in denying Evans's motion to dismiss Count Four.

III.

For the foregoing reasons, we affirm Evans's convictions.

Affirmed.

UNITED STATES of America,
Plaintiff–Appellant,

[redacted]

Adham Amin HASSOUN, Kifah Wael Jayyousi, a.k.a. Abu Mohamed, Jose Padilla, a.k.a. Ibrahim, a.k.a. Abu Abdullah Al Mujahir, a.k.a. Abu Abu Abdullah the Puerto Rican, Defendants–Appellees.

No. 06–15845.

United States Court of Appeals,
Eleventh Circuit.

Jan. 30, 2007.

Background: Five defendants were charged with various crimes arising from their alleged participation in a support cell with the aim of promoting violent jihad as espoused by a radical Islamic fundamentalist movement. Three of the defendants moved to dismiss, on double jeopardy grounds, first count of the indictment, which charged defendants with conspiracy to murder, kidnap, and maim outside the United States, as multiplicitous of counts two and three, which charged defendants with conspiracy to provide material support for the conspiracy alleged in the first count, and actual provision of such material support. The United States District Court for the Southern District of Florida, No. 04-60001-CR-MGC, 2006 WL 2415946, Marcia G. Cooke, J., granted motion, and denied Government's motion for reconsideration. Government appealed.

Holding: The Court of Appeals, Tjoflat, Circuit Judge, held that counts were not multiplicitous and did not violate Double Jeopardy Clause.

Reversed and remanded with instructions.

1. Criminal Law ⇐59(5)

Pursuant to federal aiding and abetting statute, one who has been indicted as

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104 Fed.Appx. 479, 2004 WL 1491625 (C.A.6 (Tenn.))
(Cite as: 104 Fed.Appx. 479)

U.S. [redacted]. Kisor
C.A.6 (Tenn.),2004.
This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONSixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
William Ray KISOR, II, Defendant-Appellant.

No. 02-5578.

June 22, 2004.

Background: Defendant was convicted in the United States District Court for the Western District of Tennessee of using facility or means of interstate commerce to knowingly persuade minor to engage in prohibited sexual acts, and he appealed.

Holding: The Court of Appeals, Forester, Chief District Judge, held that district court did not abuse its discretion by refusing to ask defendant's proposed question during voir dire.

Affirmed.

West Headnotes

Jury 230 ⇦131(8)

230 Jury
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k131 Examination of Juror
230k131(8) k. Personal Opinions and Conscientious Scruples. Most Cited Cases

District court did not abuse its discretion in prosecution for using facility or means of interstate commerce to knowingly persuade minor to engage in prohibited sexual acts in declining to ask potential jurors during voir dire whether they believed 16-year old girl could persuade adult male to engage in sexual activity, even if defendant's intended defense was that victim persuaded him to engage in sexual activity. 18 U.S.C.A. § 2422.

***479** On Appeal from the United States District Court for the Western District of Tennessee.

Richard [redacted] Grinalds, Asst. U.S. Attorney, U.S. Attorney's Office, Jackson, TN, for Plaintiff-Appellee.
Bruce I. Griffey, Office of Bruce Irwin Griffey, Memphis, TN, for Defendant-Appellant.

Before: MOORE, and ROGERS, Circuit Judges; and FORESTER, District Judge.[FN1]

FN1. The Honorable Karl S. Forester, Chief Judge of the United States District Court for the Eastern District of Kentucky, sitting by designation.

OPINION

FORESTER, District Judge.

****1** The Defendant-Appellant, William Ray Kisor, II, stands convicted of using a **facility** or means of interstate **commerce**-electronic mail, instant messages and long distance **telephone** conversations to knowingly persuade, induce, entice, coerce and attempt to persuade, induce, entice, and coerce a minor to engage in prohibited sexual acts in violation of 18 U.S.C. § **2422(b)**. Kisor now appeals, arguing that the district court abused its discretion by refusing to ask one of Kisor's tendered questions to the jury during voir dire. For the following reasons, we AFFIRM.

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I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In October of 2000. Kisor, who was then thirty-two years old and lived in Wellston. Ohio. met a minor female, identified as J.F., who was then sixteen years old and lived in Paris. Tennessee, in an internet chat room. For several months, the ***480** two communicated with each other through electronic mail, instant messages, and long distance telephone conversations. Many of these communications involved graphic descriptions of sexual desires and sexual role playing. Kisor does not dispute the fact that he initiated some of these communications.

On March 13, 2001, J.F.'s mother. Donna Gay Francisco, became suspicious when J.F.'s name appeared on her high school's daily absentee list. Francisco began looking for her daughter and eventually located her truck in front of a room at a local motel. Francisco knocked on the door of that room, and Kisor opened the door wearing only his boxer shorts. Francisco recognized the clothes on the motel room floor as belonging to J.F., and heard J.F. in the bathroom. In response to Francisco's questioning, Kisor admitted that he knew that J.F. was only sixteen years old and that he knew that it was illegal to cross state lines into the State of Tennessee to engage in sexual activity with a minor. Francisco called the police, and Kisor was arrested.

A federal grand jury returned a two count indictment against Kisor, Count One charged Kisor with persuading, inducing, enticing, or coercing and attempting to persuade, induce, entice, or coerce a minor to engage in sexual acts that constitute a prosecutable offense under Tennessee law [FN2] in violation of 18 U.S.C. § 2422(b).[FN3] Count Two sought forfeiture of any instruments used by Kisor in committing the offense in accordance with 18 U.S.C. § 2253.

FN2. Tennessee Code Annotated § 39-13-506 provides in pertinent part as follows: "Statutory rape-(a) Statutory rape is sexual penetration of a victim by the defendant or of the defendant by the victim when the victim is at least thirteen (13) but less than eighteen (18) years of age and the defendant is at least four (4) years older than the victim ... (c) Statutory rape is a Class E felony."

FN3. This section was amended after Kisor was indicted.

At trial in January of 2002, Kisor requested that the district court ask potential jurors the following question during voir dire: "Whether they believe a 16 year old girl can persuade an adult male to engage in sexual activity?" The district court denied Kisor's request on the grounds that the answer to the question would not be relevant. A jury was empaneled and Kisor was convicted on Count One. The jury also determined that specified items were subject to forfeiture under Count Two. Kisor timely filed the instant appeal, claiming that the district court abused its discretion by failing to ask Kisor's proposed question during voir dire. This is the sole issue on appeal.

II. STANDARD OF REVIEW

****2** This Court has articulated the following standard of review of district courts' conduct of voir dire:

In reviewing the district court's voir dire in this case, we must determine whether the court 'abused the broad discretion vested in [it] by the rulings of the Supreme Court of the United States in [its] impaneling of [the] jury.' *United States* [redacted] *Phibbs,* 999 F.2d 1053, 1071 (6th Cir.1993) (quoting *United States* [redacted] *Blanton,* 719 F.2d 815, 822 (6th Cir.1983)), remaining mindful of the fact that a district court 'retains great latitude in deciding what questions should be asked on voir dire.' *Mu'Min* [redacted] 500 U.S. 415, 424, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991). We ascertain only whether the district court ensured that Middleton had 'a fair trial by a panel of impartial, "indifferent" jurors.' ***481***Irvin* [redacted] *Dowd,* 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Only in the absence of a fair trial is reversal warranted. *See id.*

United States [redacted] *Middleton,* 246 F.3d 825, 834-35

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(6th Cir.2001).

III. ANALYSIS

The district court did not abuse its discretion in declining to ask Kisor's proposed question during voir dire. "Judges need not use every question submitted by counsel; they need only use those to which an anticipated response would afford the basis for a challenge for cause." *United States [redacted] Fish,* 928 F.2d 185, 185 (6th Cir.1991). A challenge for cause is subject to the district court's approval and must be supported by a finding of actual or implied bias. *Hughes [redacted] United States,* 258 F.3d 453, 458 (6th Cir.2001). Kisor's proposed question could not have been expected to elicit a response that would have provided a basis for a challenge for cause because no possible answer to the question would have shown actual or implied bias.

Kisor contends that the district court's refusal to ask his proposed question prevented him from discovering whether potential jurors were biased. He maintains that, because his intended defense was that J.F. persuaded him to engage in sexual activity, it was necessary for him to discover whether potential jurors would be willing to find a sixteen year old girl capable of such persuasion. In raising this claim, Kisor presupposes that there were two possible outcomes at trial. First, the jury could find that he persuaded J.F. to engage in sexual activity. Kisor does not dispute that, upon such a finding, the jury would be required to find him guilty of the offense. Second, the jury could find that J.F. persuaded Kisor to engage in sexual activity. Kisor contends that, upon such a finding, the jury would be required to find him not guilty of the offense.

Kisor's argument is based upon an incorrect framing of the relevant possibilities at trial. Under Kisor's construct, either he persuaded J.F. or J.F. persuaded him. This flawed construct ignores other possibilities, namely that Kisor and J.F. engaged in mutual persuasion or that neither Kisor nor J.F. needed any persuading. The reality of these additional possibilities becomes ever clearer once the rest of the statutory possibilities-enticing, inducing, coercing or attempting to persuade, entice, induce, or coerce-are considered.

****3** Kisor has failed to explain why a juror who believed that J.F. could not have persuaded Kisor into engaging in sexual activity would be unable to follow the district court's instructions and decide the case on the evidence presented at trial. Even if a juror refused to believe that J.F. could have persuaded Kisor to engage in sexual activity, that juror could still conclude, on the basis of J.F.'s conduct, that Kisor did not violate 18 U.S.C. § 2422(b) because J.F. needed no persuading, enticing, inducing, or coercing to participate in sexual activity. The jury was charged with determining the lawfulness of Kisor's conduct-not J.F.'s conduct-and the district court did not abuse its discretion by refusing to ask Kisor's proposed question during voir dire.

IV. CONCLUSION

Accordingly, we AFFIRM the judgment of the district court.

C.A.6 (Tenn.),2004.
U.S. [redacted] Kisor
104 Fed.Appx. 479, 2004 WL 1491625 (C.A.6 (Tenn.))

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H

United States District Court,
E.D. [redacted],
Alexandria Division.
UNITED STATES of America,
[redacted].
David A. KAYE, Defendant.
No. 1:06cr205 (JCC).

Sept. 6, 2006.

Background: Trial was held on charges of coercion and enticement and of travel with intent to engage in illicit sexual conduct.

Holding: The District Court, Cacheris, J., held that evidence, including that defendant believed he was going to engage in sexual activity with a 13-year-old boy, established beyond a reasonable doubt all elements of the charged offenses.
Ordered accordingly.

West Headnotes

[1] Infants ⚿13
211k13 Most Cited Cases
To convict for coercion and enticement, the Government must prove the following elements beyond a reasonable doubt: (1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) a person who is younger than eighteen; (4) to engage in an illegal sexual activity.
18 U.S.C.A. § 2422(b).

[2] Commerce ⚿82.10
83k82.10 Most Cited Cases

[2] Infants ⚿13
211k13 Most Cited Cases
To convict under the statute prohibiting sexual abuse of children in interstate commerce, the Government must prove beyond a reasonable doubt that a defendant: (1) traveled in interstate commerce and (2) acted with the intent to engage in illicit sexual conduct. 18 U.S.C.A. § 2423(b).

[3] Criminal Law ⚿561(1)
110k561(1) Most Cited Cases
In determining the guilt or innocence of an individual under a specific statute, the court must apply the facts proven beyond a reasonable doubt to the elements of the offense; if all elements of the offense have been met by the Government, defendant will be found guilty.

[4] Commerce ⚿82.10
83k82.10 Most Cited Cases

[4] Infants ⚿13
211k13 Most Cited Cases

[4] Telecommunications ⚿1351
372k1351 Most Cited Cases
Evidence established beyond a reasonable doubt all elements of an attempt to violate the statute prohibiting the use of a facility of interstate commerce to coerce and entice minors to engage in sexual activity; defendant admitted that he communicated using email and Internet instant messaging, a chat log established that he persuaded, enticed, and induced his correspondent to engage in a sexual act, and evidence, including chat room logs and a videotape of the defendant when he was confronted at a location where he went to meet the correspondent, showed that he believed the correspondent to be a 13-year-old boy, despite his claim that he believed he was going to meet a young adult for a homosexual encounter. 18 U.S.C.A. § 2422(b).

[5] Commerce ⚿82.10
83k82.10 Most Cited Cases

[5] Infants ⚿13
211k13 Most Cited Cases

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[5] Telecommunications ⚿1012
372k1012 Most Cited Cases

[5] Telecommunications ⚿1350
372k1350 Most Cited Cases
Transmission of communication by means of the telephone or Internet constitutes the "use of a facility of interstate commerce," for purposes of the statute prohibiting the use of facility of interstate commerce to coerce and entice minors to engage in sexual activity. 18 U.S.C.A. § 2422(b).

[6] Commerce ⚿82.10
83k82.10 Most Cited Cases

[6] Infants ⚿13
211k13 Most Cited Cases

[6] Telecommunications ⚿1350
372k1350 Most Cited Cases
Use of the Internet, particularly Internet chat rooms, necessarily involves interstate communications and therefore constitutes the "use of a facility of interstate commerce" for purposes of the statute prohibiting the use of a facility of interstate commerce to coerce and entice minors to engage in sexual activity. 18 U.S.C.A. § 2422(b).

[7] Commerce ⚿82.10
83k82.10 Most Cited Cases

[7] Infants ⚿13
211k13 Most Cited Cases

[7] Telecommunications ⚿1351
372k1351 Most Cited Cases
Evidence established beyond a reasonable doubt all elements of travel with intent to engage in illicit sexual conduct; defendant admitted that he traveled from Maryland to [redacted] and that he was traveling to engage in homosexual activity with a "young adult," and evidence, including Internet chat room logs and a videotape of the defendant when he was confronted at his destination, showed that he believed the individual he was to meet was a 13-year-old boy. 18 U.S.C.A. § 2423.
***776** Peter David Greenspun, Greenspun & Mann PC, Fairfax, VA, for Defendant.

Edmund P. Power, United States Attorney'S Office, Alexandria, VA, for United States of America.

MEMORANDUM OPINION

CACHERIS, District Judge.

The matter before this Court is whether Defendant, David A. Kaye, violated 18 U.S.C. § 2422(b) and 18 U.S.C. § 2423(b) by using the Internet to persuade, induce, or entice an individual whom he believed was a thirteen-year-old boy to engage in a sexual act and by traveling from Maryland to [redacted] for a sexual rendezvous with said individual. For the following reasons, this Court finds Defendant guilty on both counts.

I. Findings of Fact

The basic facts of this case are largely undisputed as between the Government and Defendant. In evaluating Defendant's guilt or innocence, the Court carefully considered those facts that it found proven beyond a reasonable doubt. The Court's findings of fact are as follows:

A. On August 7, 2005, at 3:50 AM, Defendant, a fifty-four-year-old male in Rockville, Maryland under the America Online ("AOL") screen name [FN1] "REDBD," initiated contact by instant message [FN2] with screen name "MadC Rad1992."

> FN1. "A screen name is an appellation used to identify oneself in a chat room or when sending instant messages to another computer user. Although it can be the user's real name, it is more often a pseudonym." *United States [redacted] Mitchell,* 353 F.3d 552, 554 n. 3 (7th Cir.2003).

> FN2. As its name describes, an "instant message" is a one-on-one communication whereby two parties are able to engage in real-time dialogue by typing messages to one another and sending/receiving the messages almost instantly.

B. The screen name "MadC Rad1992" described

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himself to "REDBD" as a thirteen-year-old boy named "Conrad" located in Herndon, [redacted]. His internet "profile" stated that he was a thirteen-year-old ***777** boy and his screen name contained the number "1992," which purports to be the year in which the individual was born.

C. During all relevant times, the screen name "MadC Rad1992" was controlled in reality by a 26-year-old male in Florida by the name of Sean O'Connor, a member of an organization called Perverted Justice. [FN3]

> FN3. Perverted Justice is an organization that is dedicated to exposing adults who use the Internet to seek sexual activity with children. The *modus operandi* of the organization is to have members pose as a young children in internet "chat rooms" and wait to be contacted by adults that engage them in a sexual dialogue. The organization often involves law enforcement and also may publish information about the adult, including the sexually explicit chat, on the Internet.

D. In this "chat" conversation on August 7, 2005, the following dialogue occurred between Defendant and MadC Rad1992: [FN4]

> FN4. Due to the informal nature of online "chatting," the conversations involve numerous typographical errors, symbols, shorthand, and abbreviations. For the sake of intelligibility of the conversation, this Court has not used "[sic]" to indicate every error or mistake in the original conversation.

REDBD [3:50 AM]: hi
MadC Rad1992 [04:04 AM]: yo
REDBD [04:04 AM]: hey
MadC Rad1992 [04:05 AM]: sorry u[you] im[instant message] me earlier I was eating a snak
MadC Rad1992 [04:05 AM]: sup
REDBD [04:05 AM]: ok you are only 13?
MadC Rad1992[04:05 AM]: yup 13 m[male] herndon u?

. . . . .

REDBD [4:06 AM]: you cute?

. . . . .

MadC Rad1992[04:06 AM]: i have a pic[picture]

. . . . .

REDBD [04:07 AM]: please
[At this time, Mr. O'Connor sent Defendant a child's picture that he downloaded from an adoption website.]
MadC Rad1992[04:07 AM]: r[are] u cute?
REDBD [04:07 AM]: nah but for 54 im decent i only ha[ve] x pics and dont want to send them to you because you are so young

. . . . .

REDBD [04:07 AM]: you are very cute man wha ti syour name

. . . . .

REDBD [04:09 AM]: where do you live?

. . . . .

REDBD [04:09 AM]: you alone

. . . . .

REDBD [04:09 AM]: i would like to suck your dick
MadC Rad1992[04:09 AM]: rlly? that would be way kewl
REDBD [04:10 AM]: have you ever had someone suck you
MadC Rad1992[04:10 AM]: no i really want head [fellatio] tho[though]
MadC Rad1992[04:10 AM]: i wanna kno what its like
REDBD [04:10 AM]: you jo[masturbate] alot?

. . . . .

REDBD [04:11 AM]: doy oucum[sic] a lot
REDBD [04:11 AM]: ever been naked whit a boy or girl
MadC Rad1992[04:12 AM]: no:(
[after MadC Rad 1992 describes that he would like to do "stuff"] ...

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***778** REDBD [04:13 AM]: well i can help you out
MadC Rad1992[04:13 AM]: sweet:)

. . . . .

REDBD [04:13 AM]: you seem sweet
[After discussing that his father would be out of town soon, but that he was not allowed to throw parties] ...
REDBD [04:14 AM]: but we could still party
REDBD [04:14 AM]: just you and me

. . . . .

REDBD [04:21 AM]: maybe ill send you my pics

. . . . .

REDBD [04:21 AM]: you have mail

. . . . .

REDBD [04:24 AM]: you are sweet
REDBD [04:24 AM]: you are not a cop are you
[Defendant and "Conrad" discuss the death of Conrad's mother] ...
REDBD [04:36 AM]: how long ago did your mom die?

. . . . .

MadC Rad1992[04:47 AM]: 6 yrs ago
MadC Rad1992[04:47 AM]: when I[w]as 7
REDBD [04:47 AM]: wow you were very young

. . . . .

REDBD [04:51 AM]: soy ou [sic] in herndon

. . . . .

REDBD [04:51 AM]: that far from me but you would be worth it
REDBD [04:51 AM]: you have nice dick?
MadC Rad1992[04:51 AM]: its ok
MadC Rad1992[04:51 AM]: it s like 5"
REDBD [04:51 AM]: cut?
MadC Rad1992[04:51 AM]: yep
REDBD [04:51 AM]: nice to sukc[sic] 5 ers
MadC Rad1992[04:51 AM]: well tehn u'll like 2 suck mine lol [laughing out loud]
MadC Rad1992[04:52 AM]: I dont got a lot of hair like alot of dudes is that kewl?
REDBD [04:52 AM]: sure
REDBD [04:52 AM]: you me aroudn your dick or on your body
MadC Rad1992[04:52 AM]: both
MadC Rad1992[04:52 AM]: none on my body
REDBD [04:53 AM]: i love smooth men

. . . . .

[Defendant and "Conrad" discuss the relationship of his father and his girlfriend] ...
REDBD [04:56 AM]: ok
REDBD [04:56 AM]: you hard now again
MadC Rad1992[04:56 AM]: uhm yeah it never rlly left lol
MadC Rad1992[04:56 AM]: r u ?
REDBD [04:57 AM]: lol
REDBD [04:57 AM]: oh yes honey

E. During the August 7th interaction, Defendant spoke on the phone with a person who posed as the thirteen-year-old "Conrad." In reality, the voice on the phone was Alison Shea, a 24-year-old woman and also a member of Perverted Justice. Shea had been corresponding with O'Connor during his sexual dialogue with Defendant.

F. Also during this conversation, Defendant and "Conrad" electronically exchanged pictures. Mr. O'Connor, posing as "Conrad," provided Defendant with a picture of a young male that he downloaded from an adoption website. In return, Defendant sent "Conrad" pornographic pictures of himself. These sexually explicit pictures were of Defendant posing nude and engaging in fellatio with another male. (Govt. Ex. 4-1 through 4-5).

***779** G. On August 10, 2005, the following dialogue occurred in a chat conversation between Defendant and MadC Rad1992:
MadC Rad1992[10:41 AM]: hello
MadC Rad1992[10:41 AM]: :)
MadC Rad1992[10:41 AM]: UGH! its early!!!
REDBD [10:42 AM]: hey cutie
MadC Rad1992[10:42 AM]: hi!!!!
MadC Rad1992[10:42 AM]: i got ur email
REDBD [10:42 AM]: :)
REDBD [10:43 AM]: im at work now. is dad still at home?
REDBD [10:43 AM]: i have to go
MadC Rad1992[10:42 AM]: r u busy?

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MadC Rad1992[10:42 AM]: awww ok

. . . . .

H. On August 16, 2005, the following dialogue occurred in a chat conversation between Defendant and MadC Rad1992:

. . . . .

REDBD [04:39 PM]: let me call you soon
MadC Rad1992 [04:39 PM]: how have you been ?
REDBD [04:39 PM]: still in a meeting give me 20 more minutes is dad home?
MadC Rad1992[04:40 PM]: ok
REDBD [04:40 PM]: is dad home?
MadC Rad1992 [04:40 PM]: no
REDBD [04:40 PM]: is he away?
MadC Rad1992 [04:41 PM]: he will be leaving tomorrow
REDBD [04:41 PM]: for how long? you will be alone?
MadC Rad1992 [04:41 PM]: for until Friday or Sat. and ya
MadC Rad1992 [04:41 PM]: no1 [no one] is avialable to stay with me
REDBD [04:41 PM]: yummy
REDBD [04:41 PM]: I can stay with you
REDBD [04:41 PM]: lol

. . . . .

REDBD [04:50 PM]: what is your scheudle tonite and where do yolive again?
MadC Rad1992 [04:51 PM]: Herndon man

. . . . .

REDBD [04:51 PM]: can i cum[sic] over?
[Defendant and "Conrad" discuss when his father is coming home that evening.]
REDBD [04:52 PM]: what time does he cum[sic] home tontie?

. . . . .

REDBD [04:57 PM]: stats again?
MadC Rad1992 [04:58 PM]: 5'5" 120 lbs
MadC Rad1992 [04:58 PM]: what u doin tomorrow? cuz he leaves
REDBD [04:57 PM]: age?
MadC Rad1992 [04:58 PM]: u gotta work?
MadC Rad1992 [04:58 PM]: 13
REDBD [04:58 PM]: im at work but could take off sometime but for sure after work i can cum[sic] over
REDBD [04:58 PM]: you are only 13?
MadC Rad1992 [04:58 PM]: uhh yea
REDBD [04:58 PM]: thats rape
MadC Rad1992 [04:59 PM]: dood I tell ya that before
REDBD[04:59 PM]: yes i remember
MadC Rad1992 [04:59 PM]: oh ok
REDBD [04:59 PM]: yes i remember
REDBD [04:59 PM]: just that you are sooo sooo young
REDBD [04:59 PM]: ive never been with a young man like you
REDBD [04:59 PM]: but i would like to

. . . . .

***780** MadC Rad1992 [04:59 PM]: i want 2 try stuff
REDBD [05:00 PM]: i can let you try anything you want
REDBD [05:00 PM]: waht do you want to try
MadC Rad1992 [05:00 PM]: and i want u to suck me like in that pic u sent me
REDBD [05:00 PM]: i can suck your dick
REDBD [05:00 PM]: *you ever been sucked?
MadC Rad1992 [05:00 PM]: no, never
MadC Rad1992 [05:00 PM]: im stoked 2 try it
REDBD [05:00 PM]: you cut?
MadC Rad1992 [05:00 PM]: SOOO stoked
MadC Rad1992 [05:00 PM]: ya
REDBD [05:01 PM]: yummy conrad

. . . . .

MadC Rad1992 [05:07 PM]: u like sucking? or beng suckd?
REDBD [05:07 PM]: you tell me what you want to do
REDBD [05:07 PM]: I like sucking and being sucked
REDBD [05:08 PM]: i like ot kiss
MadC Rad1992 [05:08 PM]: i wanna try that
REDBD [05:08 PM]: and rub assholes
MadC Rad1992 [05:08 PM]: ohh@ and kiss! kiss alot
MadC Rad1992 [05:08 PM]: ok,

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REDBD [05:08 PM]: you just have to be very clean i your ass
REDBD [05:08 PM]: no shit
MadC Rad1992 [05:08 PM]: ohh
MadC Rad1992 [05:08 PM]: can u show me?
REDBD [05:08 PM]: how to clean your asshole?
MadC Rad1992 [05:08 PM]: well
MadC Rad1992 [05:09 PM]: i think im clean but i wanna make sure im doin it rite u know?
REDBD [05:09 PM]: ok ic an hlep you

[Defendant and "Conrad" then discuss what time to meet and also arrange a quick phone call from Defendant to "Conrad."]

I. On August 17, 2005, the following dialogue occurred in a chat conversation between Defendant and MadC Rad1992:

. . . . . .

REDBD [09:53 AM]: So what the time my young sexy guy

. . . . . .

MadC Rad1992 [10:05 AM]: what u want me to wear?
REDBD [10:05 AM]: lol
REDBD [10:05 AM]: NOTHING.

[Defendant and "Conrad" discuss what time to meet as well as where the meeting will take place.]

. . . . . .

REDBD [10:25 AM]: sure I love to kiss have you kissed many people?
REDBD [10:25 AM]: boys or girls romantically
MadC Rad1992 [10:25 AM]:just a girl but no tongue
REDBD [10:26 AM]: tell me about that
MadC Rad1992 [10:26 AM]: we were at a dance
MadC Rad1992 [10:26 AM]: and then after we kissd
REDBD [10:26 AM]:did you slow dance with here
MadC Rad1992 [10:26 AM]: yeah
REDBD [10:26 AM]: did you get hard when you danced next to here
REDBD [10:25 AM]: her
MadC Rad1992 [10:26 AM]: yeah lol how did u know?
REDBD [10:25 AM]: we all do that

. . . . . .

REDBD [11:36 AM]: im leavning now

(Govt.Ex.1).

J. On August 17, around 12:00 PM, Defendant traveled from Maryland to ***781** Herndon, [redacted] to meet "Conrad" to engage in sexual activity. During this trip, Defendant made several phone calls to "Conrad" to inform him of his location and that he was "on his way." (Govt.Ex.9).

K. Defendant arrived at the address provided by "Conrad" and entered the house through the garage. Unbeknownst to Defendant, the house was being used in a cooperative "sting" operation between NBC Dateline and Perverted Justice.

L. Defendant was filmed by a hidden camera and was quickly approached by NBC Dateline correspondent Chris Hansen, who began to question Defendant.

M. When asked by Hansen "what are you doing here?" Defendant replied, "Not something good ... this isn't good." Hansen referenced the chat log and confronted him about the appearance that Defendant was "setting up a meeting with a 13-year-old boy." (Govt.Ex.6a). Defendant made incriminating statements such as "You know I'm in trouble. I know I'm in trouble." Upon learning Hansen was from NBC Dateline and that he was being filmed, Defendant became upset and departed the house.

N. Defendant soon thereafter attempted to delete his entire America Online account "REDBD" as well as erase the hard drive of his computer at work.

II. Elements of 18 U.S.C. § 2422(b) and 2423(b)

On May 18, 2006, a grand jury returned a two-count indictment charging Defendant with one count of coercion and enticement in violation of 18 U.S.C. § 2422(b) and one count of travel with intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b). On August 21, 2006, Defendant waived his Sixth Amendment right to a jury trial

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and requested a bench trial.

With respect to Count I, the statute 18 U.S.C. § 2422(b)is commonly used as a tool in the Federal Government's attempts to prevent sexual abuse of children using the Internet. The statute's text provides:

> 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 5 years and not more than 30 years.

18 U.S.C. § 2422(b) (2006) (emphasis added). The statute's primary focus is on adults using the Internet to seek out and persuade minors to meet for the purpose of engaging in sexual activity. The statute is often used in the context of sting operations that involve adults posing as minors in an Internet "chat session." Many defendants have challenged this use of the statute, claiming that an "actual minor" as a victim is required. However, every Court of Appeals to address this issue has uniformly upheld this use of the statute and that an "actual minor" is not required. [FN5]

> FN5. In fact, Defendant challenged this use of the statute in this case, but the Court denied his challenge and upheld the interpretation that the statute does not require an "actual minor" in accordance with precedent. *See United States [redacted] Tykarsky,* 446 F.3d 458 (3rd Cir.2006); *United States [redacted] Blazek,* 431 F.3d 1104 (8th Cir.2005); *United States [redacted] Sims,* 428 F.3d 945, 959-60 (10th Cir.2005); *United States [redacted] Meek,* 366 F.3d 705, 717-20 (9th Cir.2004); *United States [redacted] Root,* 296 F.3d 1222, 1227-29 (11th Cir.2002); *United States [redacted] Farner,* 251 F.3d 510, 513 (5th Cir.2001); *United States [redacted] Bailey,* 228 F.3d 637, 639 (6th Cir.2000).

***782** [1] To convict under § 2422(b), the Government must prove the following elements beyond a reasonable doubt: (1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) a person who is younger than eighteen; (4) to engage in an illegal sexual activity. *See United States [redacted] Helder,* 452 F.3d 751, 755 (8th Cir.2006); *United States [redacted] Meek,* 366 F.3d 705, 718 (9th Cir.2004); *United States [redacted]* 165 Fed.Appx. 586, 588 (10th Cir.2006); ***United States [redacted] Bolen,* 136 Fed.Appx. 325, 329 (11th Cir**.2005).

Defendant has been charged with criminal attempt under the statute since there was no actual minor involved and, as such, the offense was not completed. Consequently, the Government must also prove that Defendant: (1) acted with the kind of culpability required for a conviction of the underlying substantive offense; (2) engaged in conduct that constitutes a substantial step toward commission of the crime. *See United States [redacted] Farner,* 251 F.3d 510, 513 (5th Cir.2001); *Helder,* 452 F.3d at 755.

[2] With respect to Count II, the statute 18 U.S.C. § 2423(b) is used by the federal government to prevent the sexual abuse of children in interstate commerce. The statute's relevant text provides:

> A person who travels in interstate commerce ... for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(b). From this text, to convict an individual under this statute, the Government must prove beyond a reasonable doubt that a defendant: (1) traveled in interstate commerce and (2) acted with the intent to engage in illicit sexual conduct. *See, e.g., United States [redacted] Bredimus,* 352 F.3d 200, 208 (5th Cir.2003); *United States [redacted] Hersh,* 297 F.3d 1233, 1246 (11th Cir.2002); *United States [redacted] Gamache,* 156 F.3d 1, 8 (1st Cir.1998); *United States [redacted] Vang,* 128 F.3d 1065, 1068 (7th Cir.1997).

III. Application

[3][4] In determining the guilt or innocence of an individual under a specific statute, the Court must

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apply the facts proven beyond a reasonable doubt to the elements of the offense. If all elements of the offense have been met by the Government, Defendant will be found guilty. This Court will first address Defendant's alleged violation of § 2422(b) followed by Defendant's alleged violation of § 2423(b).

A. Coercion and Enticement under § 2422(b)

1. "Use of Facility of Interstate Commerce"

[5][6] First, the Government must prove that Defendant used a facility of interstate commerce. A transmission of communication by means of the telephone or Internet constitutes the use of a facility of interstate commerce. Use of the Internet, particularly Internet chat rooms, necessarily involves interstate communications and therefore constitutes the "use of a facility of interstate commerce." *United States v. Hornaday,* 392 F.3d 1306, 1311 (11th Cir.2004). At trial, Defendant admitted that he communicated with "Conrad" using email and Internet instant messaging. Therefore, Defendant used a facility of interstate commerce and this element of the offense is satisfied.

2. "To Knowingly Persuade, Induce, Entice, or Coerce"

Next, the Government must prove that Defendant knowingly attempted to *persuade, ***783** induce, entice, or coerce* the victim. There is no definition for these terms included in the statute. Generally, courts have treated this element as self-explanatory while some have provided dictionary definitions and alternative language to juries such as "convinced, influenced or made the possibility more appealing" and "to stimulate the occurrence of." *United States v. Rashkovski,* 301 F.3d 1133, 1137 (9th Cir.2002); *United States v. Murrell,* 368 F.3d 1283, 1287 (11th Cir.2004). This Court rests on the plain meaning of the words in the statute in deciding whether the Government has satisfied this element.

The chat log between Defendant and "Conrad" (with excerpts provided *infra* Section I) provides more than sufficient evidence that Defendant persuaded, enticed, and induced the young boy to engage in a sexual act. From the outset of the relationship, Defendant repeatedly provided "Conrad" with compliments of being "cute" and "sweet." These compliments were followed not by sexual innuendo, but by blatant, aggressive sexual advances on "Conrad" such as "I want to suck your dick" and "have you ever had someone suck you?" Defendant tells the child that he can let the child "try anything you want" and suggests other forms of oral and manual stimulation. Such aggressive, persuading advances by an adult on a thirteen-year-old-boy are clearly attempts to induce and entice the child to engage in sexual activity.

Moreover, Defendant's attempts to persuade, induce, and entice do not end there. Defendant sends sexually explicit pictures to Conrad depicting himself posing nude and engaging in sexual acts. Defendant asked whether the young boy has "ever been naked with a boy or a girl" and offering "to help [Conrad] out." Defendant asks personal, sexual questions to the child about masturbating, ejaculating, and whether he has a "nice dick." This Court finds that the pictures and sexually suggestive advances on the child were direct attempts to persuade, induce, and entice the child to engage in sexual activity.

Counsel for Defendant argues that these comments were not sincere, but instead were simply "talking dirty" over the Internet. This Court strongly disagrees, and finds that these comments were backed by substantiated sexual intent as evidenced by Defendant's conduct. Namely, Defendant consistently asked whether the child's father is home, scheduled a time to "cum[sic] over," and actually drove across state lines to "Conrad's" house. Defendant intended far more than "talking dirty." He intended sexual activity.

Counsel for Defendant further argues that it was Defendant that was induced or enticed by the members of Perverted Justice posing as a thirteen-year-old boy. Upon carefully looking at the chat logs in evidence, some of the interaction made by "Conrad"/Perverted Justice could certainly be

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considered as inviting sexually explicit responses. (e.g. "no i really want head tho"). Furthermore, this Court recognizes that Perverted Justice is an organization dedicated to exposing child molesters and clearly had a motive to "deliver" Defendant since it was being featured on NBC Dateline, receiving $100,000 from NBC. However, Defendant's argument proves to be unpersuasive for three reasons:

First, in almost any context, Defendant's language and actions in this case can only be regarded as an attempt to persuade, entice, and induce the other individual to engage in a sexual activity. Defendant stated "I want to suck your dick" before any inviting language had been received by Defendant and Defendant sent sexually explicit pictures soon thereafter. This aggressive behavior, without any invitation from "MadC Rad 1992", would be considered ***784** an attempt to persuade, induce, and entice.

Second, as discussed in the next section, Defendant believed that he was interacting with a thirteen-year-old boy. No degree of interest, curiosity, or mutual enticement from a thirteen-year-old is enough to find that Defendant's aggressive language and actions are not an attempt to persuade, induce, and entice the individual to engage in sexual activity.

Third, Defendant's chat conversations with "Conrad" and his testimony clearly demonstrate his predisposition to engaging in sexual activity with persons from Internet conversations, including thirteen-year-old males.

Therefore, this Court finds beyond a reasonable doubt that the statements and the pictures from Defendant to "Conrad" were an attempt to persuade, induce, and entice the individual under screen name "MadC Rad1992" to engage in sexual activity.

3. "A person younger than eighteen years of age"

Third, the Government must prove that Defendant believed that the individual he was persuading, inducing, and enticing was *below eighteen years of age.* As stated *infra,* the Government need not prove the existence of an "actual minor" but only that Defendant believed that "Conrad" was below eighteen years of age. Defendant argues that he believed he was meeting a young adult (of consenting age) for a homosexual encounter and that the picture and voice of the person purporting to be "Conrad" were that of an eighteen-year-old male. After evaluating the evidence, the Court is not persuaded by Defendant's arguments and finds that Defendant believed the individual he was inducing, enticing, and persuading was a thirteen-year-old male.

First, the evidence shows that on August 7, 2005, Defendant was aware of "Conrad's" age even before the initial contact. Without any reference to age by "Conrad," Defendant stated "ok y ou are only 13?" in the third instant message he ever sent to the screen name MadC Rad1992. This fact alone shows that Defendant either (1) previously viewed "Conrad's" online profile (which contained his age), discovered he was thirteen-years-old, and then initiated contact; or (2) viewed "Conrad's" screen name of MadC Rad1992, assumed this was a reference to the year in which the individual was born (thirteen years prior in 2005), and then initiated contact. Either scenario requires Defendant to have affirmative knowledge of the child's age even before the first contact.

Second, Defendant repeatedly acknowledged "Conrad" as "young" and as a thirteen-year-old boy in online conversations that occurred between August 7- 17, 2005: "I only ha[redacted]e x pics and don't want to send them to you because you are so young", "for a 13 yr old you handle yourself very well", "you are only 13? thats rape", "you are sooo sooo young", and "ive never been with a young man like you/but would like to." This repeating, unambiguous acknowledgment of "Conrad's" age leads this Court to conclude that Defendant believed that he was persuading, inducing, and enticing an individual of thirteen years of age.

Defendant's testimony that he believed he was going to meet a young adult for a homosexual encounter is not persuasive for two reasons. First,

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when viewed in light of the chat log and the videotape of his interview with the NBC Dateline correspondent, Defendant's statement that he was meeting a young adult is not credible. Upon being confronted by the correspondent, Defendant's demeanor, body language, and facial reaction is one of complete ***785** and utter shock. This is followed by Defendant stating "I know I'm in trouble" and when asked "what are you doing here" Defendant said "not something good." Defendant's behavior is not consistent with his testimony that he believed he was meeting a young adult, but instead, corroborates the extensive chat log portraying Defendant's belief that "Conrad" was a thirteen-year-old boy. Second, the Court did not find Defendant's testimony to be credible in its assessment of his veracity, demeanor, cadence, tenor, and inflection of his voice as well as the consistency of his answers on cross examination.

Defendant proffered expert testimony at trial to discuss the picture and voice of the person Perverted Justice purported to be "Conrad." With respect to the picture, an expert testified that the child depicted in the picture emailed to Defendant appears to have fully developed facial features, and accordingly, the child depicted in the picture could be an eighteen-year-old male. On cross examination, the expert testified that he could not give the exact age of the child with any degree of certainty, but, as expected, could only offer a range within which the child's age is likely to fall. The expert concluded the child in the picture could be eighteen, but he could also be much younger.

Defense counsel argues that since the picture depicts a person that could be an eighteen-year-old, it provides reasonable doubt with respect to Defendant's mental state that he believed he was enticing a minor for sex. This Court disagrees. Even if this Court agreed with the expert's testimony, the expert testified only that the age "could be" that of an eighteen-year-old. Never did the expert testify that the picture could not also reasonable depict a thirteen-year-old boy. This tentative, inconclusive testimony, received in light of the overwhelming evidence provided in the chat log that Defendant sought out a thirteen-year-old boy and confirmed his age several times, does not create a reasonable doubt that Defendant believed he was enticing, persuading, and inducing a thirteen-year-old boy to engage in a sexual activity.

Defendant's voice expert testified that the frequency of one's voice depends upon gender and age. For instance, the frequency of an adult female's voice is between 180 and 250 Hz, while an adult male's voice is between 100 and 150 Hz, consistent with the general understanding that a man's voice sounds lower in pitch than a female's. The expert analyzed a video-recording of a female from Perverted Justice speaking on the phone to Defendant (as "Conrad") and testified that the frequency of the woman's voice on the phone was 184 to 190 Hz (at the lower end of the spectrum for a female). Finally, the expert testified that the average frequency of the voice of a thirteen-and-a-half-year-old male is between that of an adult male and an adult female, centered around 174 Hz. In fact, on cross examination, the expert admitted that the frequency of the voice on the phone overlaps with that of a thirteen-year-old male:

> Q[by Government]
> So if you assume [the voice on the phone is] a male instead of a female, that frequency is actually between the age of 12.2 and 13.5, correct?
> A[by voice expert]
> That would be correct.

(Trial Tr. of Aug. 22, 2006, 297). This testimony does not persuade the Court in the slightest that Defendant believed he was speaking to an adult male. Instead, this testimony is entirely consistent with the overwhelming evidence of Defendant's belief that he was speaking to a thirteen-year-old boy, since the actual person to whom he was speaking had a pitch of 184 Hz to 190 Hz, and the pitch of a thirteen-year-old boy's voice overlaps that range.

***786** In sum, Defendant's personal testimony is not credible and his expert testimony is not persuasive. The extensive chat log and Defendant's behavior during his video-interrogation lead this Court to conclude beyond a reasonable doubt that Defendant

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believed he was "enticing, persuading, and inducing" an individual that was thirteen years of age.

4. To engage in illegal sexual activity

Fourth, the Government must prove that Defendant was enticing, persuading, or inducing the minor *to engage in illegal sexual activity,* or, as the statute reads: "any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422(b).

There is little question that Defendant intended to engage in sexual activity. He sent "Conrad" sexually explicit pictures and suggested numerous sexual activities in the chat conversation. Therefore, the inquiry becomes whether engaging in sexual activity with a thirteen-year-old boy is an act that can be charged as a crime. *United States* [redacted] *Patten,* 397 F.3d 1100 (8th Cir.2005). This includes state sexual offenses. *See, e.g., United States* [redacted] *Rayl,* 270 F.3d 709, 713 (8th Cir.2001). The Government need not prove all the elements of the offense to establish a conviction under 18 U.S.C. § 2422(b). Instead, the Government must only prove that the sexual act intended by Defendant would constitute a criminal offense under the statute.

The Government alleges that Defendant's intended conduct was in violation of the Code of [redacted], § 18.2-370, taking indecent liberties with a child. This [redacted] statute criminalizes sexual conduct with an individual under the age of fifteen. In this case, as stated several times, Defendant intended to engage in sexual activity with a thirteen-year-old boy. This conduct is clearly within the scope of the [redacted] indecent liberties statute, and thus, chargeable as a criminal offense. Thus, the Government has satisfied this final element of the substantive offense under 18 U.S.C. § 2422(b).

5. "Or attempts to do so"

Defendant has been charged with criminal attempt under the statute since there was no actual minor involved and, as such, the offense was not completed. Consequently, the Government must also prove that Defendant: (1) acted with the kind of culpability required for a conviction of the underlying substantive offense; (2) engaged in conduct that constitutes a substantial step toward commission of the crime. *See United States* [redacted] *Farner,* 251 F.3d 510, 513 (5th Cir.2001); *Helder,* 452 F.3d at 755.

Whether Defendant had the requisite culpability for the underlying offense can be addressed by inquiring whether Defendant intended to complete the offense. If Defendant intended to complete the offense, then it logically follows that he had the requisite culpability. From the previous analysis in subparts 1-4, the evidence clearly shows that Defendant *intended* to: (1) use the Internet; (2) to *knowingly* persuade, induce, or entice; (3) an individual he believed was under the age of eighteen; (4) to engage in illegal sexual activity. In fact, the only element Defendant contests that he did not have knowledge of was that the individual was under eighteen, and that claim was not credible and contrary to the evidence before the Court. Therefore, this Court concludes that he intended to complete the offense and thus had the requisite culpability. [FN6]

> FN6. In *United States* [redacted] *Root,* the Eleventh Circuit found that the defendant intended to complete the substantive offense by reviewing the online transcript ("chat log") stating that: (1) Defendant wanted to feel [victim's] "little nipples"; (2) Defendant had "never been with one your age," but would enjoy it, and (3) Defendant knew he could "get into a lot of trouble" for engaging in the activity he proposed. 296 F.3d 1222, 1228 (11th Cir.2002).

***787** The final inquiry is whether Defendant's conduct constitutes a "substantial step" toward the commission of the crime. *Id.* This element is satisfied by actual, objective acts that, independent of Defendant's mental state, strongly corroborate and provide unequivocal evidence of his culpability. *Id.* at 1229.

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In prosecutions under 2422(b) resulting from a sting operation, courts have deemed this element satisfied by the presence of several facts: (1) sexual dialog between Defendant and the "minor;" (2) repeated references to what would be performed upon meeting the minor; (3) the transmission of a sexually suggestive photograph; and (4) travel by Defendant to meet the minor. *See, e.g., United States* [redacted] *Meek,* 366 F.3d 705, 720 (9th Cir.2004); *Root,* 296 F.3d at 1229.

The instant case contains all four of these circumstances, any of which would likely be sufficient by themselves to constitute a substantial step. Defendant engaged in extensive sexual dialog with the minor and referenced the sexual activities that would occur upon meeting the minor. Additionally, he transmitted pornographic images of himself posing and performing sex acts. Finally, he drove an automobile from Rockville, Maryland to Herndon, [redacted], parked the car, walked into the house, and waited in the kitchen. From these facts, there is no question that Defendant's acts constitute a substantial step towards the commission of the crime and provide significant corroboration of his culpability.

In summation, with respect to Count I, the Government has satisfied all elements required for a conviction under 18 U.S.C. 2422(b). Specifically, the Government has proven beyond a reasonable doubt that (1) Defendant used a facility of interstate commerce, (the internet); (2) to attempt to knowingly persuade, induce, entice, or coerce; (3) a person Defendant believed to be less than eighteen years of age; (4) to engage in an illegal sexual activity. Additionally, Defendant possessed the culpability required to complete the substantive offense and his actions constitute a substantial step towards the completion of the offense. Therefore, this Court finds Defendant guilty of violating 18 U.S.C. § 2422(b).

B. Travel with Intent to Engage in Illicit Sexual Conduct under § 2423

[7] Defendant has also been charged with travel with intent to engage in illicit sexual conduct under 18 U.S.C. § 2423. To convict under this statute, the Government must prove beyond a reasonable doubt that Defendant (1) traveled in interstate commerce and (2) acted with the intent to engage in illicit sexual conduct. It is under this framework that the Court proceeds with its analysis of Count II.

1. Travel in interstate commerce

To "travel in interstate commerce" simply means to move from one state to another. Defendant has admitted that he traveled from Maryland to [redacted], therefore, this element is satisfied.

2. Intent to engage in illicit sexual conduct

Next, the Government must prove that Defendant had the intent to engage in illicit sexual conduct. The term "illicit sexual conduct" is defined in 18 U.S.C. § 2423(f) as "a sexual act(as defined in section 2246) with a person under 18 years of age that would be in violation of Chapter 109A if the sexual act occurred in the ***788** special maritime and territorial jurisdiction of the United States." [FN7] Put simply, the Government must prove that Defendant traveled with the intent to engage in sexual activity which, if it had occurred, could have been charged as an offense in a federal enclave. Section 2243(a)(within chapter 109A) criminalizes knowingly engaging in a sexual act with a person who "has not attained the age of 16 years." 18 U.S.C. § 2243(a). Therefore, if Defendant intended to engage in a sexual activity with a thirteen-year-old boy, as the Government alleges in this case, such activity is squarely within the meaning of "illicit sexual conduct" in § 2423(b). [FN8]

FN7. Section 2246 defines a "sexual act" as:
(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

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> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
> 18 U.S.C. § 2246
>
> FN8. It is not required that Defendant engage in the intended illegal sex at the destination, but solely that he act with the intent. *Hersh,* 297 F.3d at 1246-47.

This Court finds this element is satisfied since Defendant traveled with the intent to engage in sexual activity with a thirteen-year-old boy. First, it is unmistakable from the evidence that Defendant intended to engage in sexual activity at his destination. In fact, Defendant admitted so at trial when testifying that he was traveling to engage in homosexual activity, with a "young adult" nonetheless. In light of these admissions, there is little left for this Court to decide on the issue of whether Defendant intended to engage in sexual activity.

Next, this Court must decide whether this intended sexual activity is considered "illicit sexual conduct" within the meaning of the statute. As stated previously in Section A.3, this Court has concluded beyond a reasonable doubt that Defendant believed he was enticing, inducing, and persuading an individual he believed was a thirteen-year-old boy. There is no evidence before the Court (nor does defense counsel argue) that Defendant's mental state as to "Conrad's" age changed between the time he was "inducing, enticing, and persuading" over the internet and the time he was traveling almost immediately thereafter. Defendant's mental state whilst traveling is confirmed by his statements to the NBC Dateline correspondent once in Herndon, [redacted]. When asked "what are you doing here" Defendant replies "not something good" and "I know I'm in trouble."

In sum, Defendant's repeated acknowledgment of "Conrad's" age and his incriminating statements in the confrontation with NBC lead this Court to conclude that Defendant clearly intended to meet a thirteen-year-old boy for sex. Since Defendant intended to engage in sexual activity with a thirteen-year-old boy, and such sexual activity is considered "illicit sexual conduct" within the meaning of the statute, this Court concludes that this element of § 2423(b) is satisfied.

Since both elements of § 2423(b) are satisfied beyond a reasonable doubt, that Defendant traveled across state lines and that such travel was with the intent to engage in illicit sexual conduct, this Court ***789** finds Defendant guilty of violating 18 U.S.C. § 2423(b).

IV. Conclusion

For the foregoing reasons, this Court finds Defendant guilty of one count of coercion and enticement in violation of 18 U.S.C. § 2422(b)(Count I) and one count of travel with intent to engage in illicit sexual conduct in violation of 18 U.S.C. § 2423(b) (Count II).

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77 Fed.Appx. 371, 2003 WL 22331999 (C.A.6 (Ohio))
(Cite as: 77 Fed.Appx. 371)

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U.S. [redacted]. Fuller
C.A.6 (Ohio),2003.
This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONSixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

[redacted].

James Stanley FULLER, Defendant-Appellant.

No. 02-3303.

Oct. 9, 2003.

Defendant appealed his conviction, by a jury in the United States District Court for the Northern District of Ohio, John M. Manos, J., of attempting to entice a minor by computer or telephone to engage in criminal sexual activity, and related child pornography offenses. The Court of Appeals, Guy, Jr., J., held that: (1) electronic messages and e-mails were not illegally seized; (2) apartment lessee had authority to consent to warrantless search of room in which defendant was staying; (3) evidence was sufficient to support conviction for attempted enticement of a minor; (4) evidence was sufficient to establish that production of the child pornography images involved use of a minor engaged in sexually explicit conduct; and (5) sentence enhancements for use of material involving a prepubescent minor, for use of a computer in transmission of the material, on basis that offense involved distribution, and on basis that offenses involved sadistic or masochistic conduct, was not erroneous.

Affirmed.

West Headnotes

[1] Telecommunications 372 ⇐1439

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1439 k. Computer Communications. Most Cited Cases
(Formerly 372k494.1)

FBI's capture of instant messaging sessions and e-mails did not constitute an illegal warrantless seizure, where the communications were sent by defendant to an undercover FBI account.

[2] Searches and Seizures 349 ⇐125

349 Searches and Seizures
349II Warrants
349k123 Form and Contents of Warrant; Signature
349k125 k. Objects or Information Sought. Most Cited Cases

Search warrant which identified defendant's computer and its files and records as items to be seized was sufficiently particularized, with respect to the scope of the search, to allow search for defendant's computer and the files and records stored on it.

[3] Searches and Seizures 349 ⇐174

349 Searches and Seizures
349V Waiver and Consent
349k173 Persons Giving Consent
349k174 k. Owners of Property; Hosts and Guests. Most Cited Cases

Apartment lessee had authority to consent to warrantless search of spare bedroom in which defendant was staying as an overnight guest.

[4] Commerce 83 ⇐82.10

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83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases

Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
Evidence was sufficient to support conviction for attempted enticement of a minor, even if government offered no proof that victim was in fact a minor, that any sexual activity occurred, or that the necessary nexus to interstate or foreign commerce existed; age of victim and fact of sexual activity were immaterial inasmuch as defendant was only charged with attempting to entice a minor, and interstate commerce connection was established by indisputable evidence that defendant used both the internet and the telephone in committing the offense. 18 U.S.C.A. § 2422(b).

[5] Obscenity 281 ⇐2.5

281 Obscenity
281k2 Power to Regulate; Statutory and Local Regulations
281k2.5 k. Particular Regulations. Most Cited Cases
Statute under which defendant was convicted, in his prosecution on three counts relating to interstate transportation or transmission of images of child pornography, was not unconstitutionally based on virtual computer-generated images; provisions required proof that the production of the visual images involved use of a minor engaged in sexually explicit conduct. 18 U.S.C.A. § 2252(a)(1), (a)(4)(B).

[6] Obscenity 281 ⇐17

281 Obscenity
281k14 Evidence
281k17 k. Weight and Sufficiency. Most Cited Cases
Evidence was sufficient to establish, in prosecution for three counts relating to interstate transportation or transmission of images of child pornography, that production of the visual images involved use of a minor engaged in sexually explicit conduct; several experts indicated that the images appeared to be of real children, and there was no evidence that the images were computer-generated. 18 U.S.C.A. § 2252(a)(1), (a)(4)(B).

[7] Sentencing and Punishment 350H ⇐995

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
Imposition, in sentencing on three counts relating to interstate transportation or transmission of images of child pornography, of enhancement for use of material involving a prepubescent minor was not erroneous, even though trial court failed to make required factual findings; defendant failed to create any dispute of fact inasmuch as he offered no evidence to contradict medical testimony that 13 of the images were of minors at a developmental stage for which the average age was 10 years. 18 U.S.C.A. § 2252(a)(1), (4)(B); Fed.Rules Cr.Proc.Rule 32(c)(1), 18 U.S.C.A.; U.S.S.G. § 2G2.2(b)(1), 18 U.S.C.A.

[8] Sentencing and Punishment 350H ⇐995

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases
Imposition, in sentencing on three counts relating to interstate transportation or transmission of images of child pornography, of enhancement for use of a

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computer in transmission of the material, was not erroneous even though trial court failed to make required factual findings; defendant failed to create any dispute of fact inasmuch as his conviction established that he transmitted child pornography by computer, and evidence at trial showed that he sent and downloaded child pornography. 18 U.S.C.A. § 2252(a)(1), (a)(4)(B); Fed.Rules Cr.Proc.Rule 32(c)(1), 18 U.S.C.A.; U.S.S.G. § 2G2.2(b)(5), 18 U.S.C.A.

[9] Sentencing and Punishment 350H ⇐995

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases

Imposition, in sentencing on three counts relating to interstate transportation or transmission of images of child pornography, of enhancement on basis that offense involved distribution, was not erroneous even though trial court failed to make required factual findings; defendant's objections failed to create any dispute of fact inasmuch as nothing contradicted evidence that he transmitted child pornography as part of his attempt to entice a minor into sexual activity. 18 U.S.C.A. § 2252(a)(1), (a)(4)(B), 2422(b); Fed.Rules Cr.Proc.Rule 32(c)(1), 18 U.S.C.A.; U.S.S.G. § 2G2.2(b)(2), 18 U.S.C.A.

[10] Sentencing and Punishment 350H ⇐995

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HI[redacted](H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk995 k. Necessity. Most Cited Cases

Imposition, in sentencing on three counts relating to interstate transportation or transmission of images of child pornography, of enhancement on basis that offenses involved sadistic or masochistic conduct, was not erroneous even though trial court failed to make required factual findings; defendant did not dispute that his computer contained images portraying sexual penetration of prepubescent girls that would likely be painful, and he did not raise a legal controversy about the definition of sadistic conduct for purposes of the enhancement. 18 U.S.C.A. § 2252(a)(1), (a)(4)(B); Fed.Rules Cr.Proc.Rule 32(c)(1), 18 U.S.C.A.; U.S.S.G. § 2G2.2(b)(3), 18 U.S.C.A.

***373** On Appeal from the United States District Court for the Northern District of Ohio.

Before GUY and DAUGHTREY, Circuit Judges; and LAWSON, District Judge.[FN*]

FN* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

GUY, Circuit Judge.

****1** Defendant, James Stanley Fuller, appeals following his conviction by a jury on four counts: (1) attempting to entice a minor by computer or telephone to engage in criminal sexual activity (18 U.S.C. § 2422(b)); (2) interstate transportation of photographic computer files from Georgia to Ohio depicting minors engaged in sexually explicit conduct (18 U.S.C. § 2252(a)(1)); (3) interstate transmission of photographic computer files by computer depicting minors engaged in sexually explicit conduct (18 U.S.C. § 2252(a)(1)); and (4) possession of photographic computer files that had been transported in interstate commerce depicting minors engaged in sexually explicit conduct (18 U.S.C. § 2252(a)(4)(B)). Defendant, who chose to represent himself, was sentenced to a term of imprisonment of 135 months to be followed by a two-year term of supervised release.

Through appointed counsel, defendant challenges his sentence on the grounds that the district court failed to make adequate factual findings and erred in its application of the guidelines. In addition, counsel contends (in an argument also made in defendant's *pro se* filings), that defendant's convictions on counts 2, 3, and 4 must be vacated

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under *Ashcroft* [redacted] *Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), because the government failed to prove that the depictions in the computer files were of actual***374** human beings. Although sometimes repetitive and undeveloped, defendant's *pro se* filings include arguments against the admission of evidence obtained illegally from America On Line (AOL) or as a result of an illegal search of the apartment where he had been staying, and several challenges to his convictions on what appear to be sufficiency of the evidence grounds. For the reasons discussed below, we affirm defendant's convictions and sentence.

I.

Defendant came to the attention of the FBI after two adult females, Margaret Dudas and Marjorie Vizurraga, reported his preoccupation with having sex with minors. Both women made contact with defendant over the Internet through the instant messaging (IM) service offered by AOL and communicated with him by e-mail and telephone before meeting him in person.

Fuller used the screen name "Blueey0123" to communicate with Dudas through AOL. During one telephone conversation with Fuller, Dudas received an IM from someone using the screen name " K9Teacher" that forwarded a picture of a dog in a sexual position with a woman. Dudas later realized that she heard the AOL chimes on Fuller's end of the line each time "K9Teacher" communicated with her, but when she blocked messages from " K9Teacher" the chiming stopped. Fuller met Dudas at her home and, after consensual sex, commented on a photograph of Dudas's 14-year-old daughter. When Fuller asked about sex between Dudas and her daughter and expressed interest in having sex with them both, Dudas threw him out.

Fuller communicated with Vizurraga through AOL using the screen names "Stan046" and "Blueey0123. " Fuller, who said he trained major league baseball players around the country, stayed with Vizurraga in Cleveland during their brief relationship. She testified that she ended their relationship after about a month because of his preoccupation with sex and his desire to have her participate in sexual acts with multiple partners, including a 15 year-old female babysitter.[FN1]

FN1. Both Dudas and Vizurraga testified explicitly about what Fuller had said about sexual acts he wanted them to perform on underage girls while he participated. Fuller, representing himself at trial, cross-examined both of them.

****2** FBI Special Agent Brian Vigneaux began investigating Fuller. Vigneaux learned from another FBI office that an earlier AOL account in Fuller's name had been terminated for having transferred child pornography. In answer to an administrative subpoena, AOL advised that Fuller had been a member of AOL since February 27, 2000, and used screen names including " Blueey0123," "April0435," and "K9Teacher01."

With this information, Vigneaux connected to the Internet via AOL and, using the undercover screen name "Peaches14kwl," added "Blueey0123" to the account's IM "buddy list." On July 12, 2000, Vigneaux made contact with defendant and relayed that "Peaches" was almost 14 years old and lived with her mother. Fuller said he was 48 years old, and they exchanged photographs. Vigneaux sent Fuller a photograph of Special Agent Kelly Liberti, which had been taken when she was 14 years old and in which she was dressed as a cheerleader. As the session continued, Fuller asked "Peaches" to call him on the telephone and discussed, in sexually explicit terms, her body, mother/daughter sex, masturbation, and other ***375** sexual acts they could do together.[FN2] After this contact, Fuller traveled from Georgia to Cleveland, Ohio, taking his laptop computer with him.

FN2. Vigneaux employed a computer program to record all keystrokes by both participants to the IM session and another to capture the e-mails and pictures sent by Fuller. In addition, the FBI recorded the subsequent telephone conversations

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between Fuller and Agent Liberti.

During their next IM session on July 17, 2000, Fuller told "Peaches" that he was in Cleveland and was staying with a major league baseball player. He asked about meeting with her, offered to take digital pictures of her, and questioned her in explicit terms about her sexual activity and asked if she had sex with a 13-year-old girlfriend. Fuller again asked that she call him on his cellular telephone. Vigneaux arranged to have Agent Liberti call a few hours later, posing as "Peaches" and identifying herself as "Brianna." Fuller asked her age again and was told she was "almost 14." Fuller tried to arrange for them to meet that night, told her they could have privacy, promised that they would go slowly, and talked explicitly about sex.

Fuller contacted "Peaches" by instant messaging on July 19, 2000, and suggested that they could meet while her mother was at work. He accused her of being a "talker and not a doer." At the end of the session, she agreed to call him 30 minutes later. Liberti called Fuller as agreed, telling him she could ride her bicycle to meet him the following afternoon after her mom left for work. Fuller asked about her mom's age, looks, and if she was dating anyone. He also asked in explicit terms about specific sex acts; including multiple partners, domination, sex with dogs, sex with other girls, and mother/daughter sex. When Liberti expressed interest, Fuller agreed to e-mail her some pictures of things they were talking about. They discussed arrangements for their meeting the next day, and Liberti agreed to call him as soon as her mother left for work. Fuller later sent "Peaches" an e-mail with two pictures of women having sex with dogs.

****3** The next morning, July 20, Fuller and "Peaches " conversed by instant messaging about where and when they would meet and what they would each be wearing. Fuller e-mailed "Peaches" several more sexually explicit pictures; including one Fuller told her was of a 13-year-old girl.[FN3] Fuller said she could meet two Cleveland Indian baseball players after he picked her up, explaining that he would say she was the daughter of a friend, and told her that they then could go to the apartment where he was staying to be alone. About 30 minutes later, Liberti called Fuller and they arranged to meet at a nearby marina. Fuller said he would be driving a white " Jimmy" and would be wearing a blue warm-up outfit. When Fuller arrived at the arranged meeting place, he was arrested.

FN3. That file was named "13 year old getting fucked and licking mom.bmp."

Agents found handwritten notes referring to " Peaches" and giving directions to the meeting place, as well as receipts documenting Fuller's travel from Georgia to Ohio. They also found a digital camera, a blindfold, a cat-o-nine tails, and a prescription bottle containing Viagra. Agent Liberti located Russell Branyan, the baseball player with whom Fuller had been staying, and told him about the arrest. Branyan had known Fuller professionally for several years, but Fuller had never stayed with him before.

Branyan testified that Fuller spent a lot of time using the computer in the spare ***376** bedroom of the apartment. Although Branyan had asked Fuller to leave because he had continued to smoke cigarettes in the apartment, Fuller had not vacated before his arrest. Branyan offered to cooperate, gave them consent to search the apartment, and signed a consent-to-search form to that effect. When agents entered the apartment and looked in the spare bedroom, they saw a laptop computer that displayed the AOL sign-on screen for "Blueey0123" and nine "minimized" boxes showing partial file names. Although Branyan had given permission to remove Fuller's possessions, agents waited and obtained a search warrant before seizing defendant's Compaq Presario notebook computer.

Barry Gummow, a computer forensic examiner, was called to assist in the execution of the warrant. Gummow "maximized" the nine boxes so that photographs could be taken of the images, which included sexually explicit pictures involving both mother/daughter sex and sex with dogs. Grummow then shut down the computer and seized it for examination. On the computer, Gummow found evidence of child pornography downloaded through AOL from the Internet; Internet history files

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showing child pornography web sites visited by Fuller; and photographs of Fuller and other women, some taken with the digital camera seized at the time of his arrest. Among the pictures found on Fuller's computer were those that had been sent between Fuller and "Peaches."

Using the Tanner Scale of Pubertal Development, Dr. Douglas Rogers, a pediatric endocrinologist at the Cleveland Clinic, testified that 21 pictures taken from defendant's computer depicted minor females at or below Tanner Stage Four (for which the average age is 13), and that 13 of those pictures were of females at or below Tanner Stage One (for which the average age is 10). The government also offered the opinion of Douglas Rehman, an expert in computer forensics and child exploitation, concerning his examination of the images for evidence of alteration.

****4** Arrested pursuant to a complaint and warrant on July 20, 2000, Fuller was detained without bond. After the indictment was filed on August 9, 2000, Fuller was arraigned and entered a plea of not guilty. Defendant's retained counsel withdrew, as did defendant's next two court-appointed attorneys. Defendant's third appointed counsel represented him before trial and then served as an advisor during trial because defendant had asserted his right to represent himself. That attorney was permitted to withdraw prior to sentencing, and new counsel served as defendant's advisor at sentencing and filed a brief on appeal. Timely notice of appeal was filed both by Fuller and by his appointed counsel.

II.

A. Denial of Motion to Suppress

[1] Fuller filed several motions to suppress evidence, which were denied in written memoranda and orders. In reviewing the denial of a motion to suppress, we review the district court's factual findings for clear error and the legal conclusions *de novo*. *United States* [redacted] *Atkin,* 107 F.3d 1213, 1216 (6th Cir.1997). In his *pro se* filings, Fuller argues that the FBI illegally seized communications from AOL without a warrant in violation of 18 U.S.C. § 2703. Because this argument was not mentioned in the district court's orders, it is not clear whether the issue was preserved for appeal. Even if it was, however, the record is plain that the communications captured, both the instant messaging sessions and e-mails, were sent by Fuller to the undercover FBI account and were not obtained through disclosure forced upon AOL.

***377** [2] Fuller challenges the search and seizure of evidence found in the spare bedroom of Branyan's apartment on two different grounds. Fuller argues first that the warrant lacked particularity because Attachment G to the warrant only identified *items to be seized,* but did not authorize *the search for those items.* We cannot accept this distinction as meaningful and agree with the district court's implicit finding that the search warrant was sufficiently particularized with respect to the scope of the search to satisfy the Fourth Amendment and allow search for the computer and the files and records stored on it. Although Fuller challenged the warrant on other grounds, the district court observed in a footnote that defendant
has not argued that the description "all personal computers/computing systems located therein" is unconstitutionally overbroad. The Court notes that the determination of the requisite particularity must be "flexible" and the description of items to be seized need only be "as specific as the circumstances and the nature of the activity under investigation permit." *United States* [redacted] *Blair,* 214 F.3d 690, 697 (6th Cir.2000) (citing *United States* [redacted] *Ables,* 167 F.3d 1021, 1033 (6th Cir.1999)).

[3] Second, Fuller challenges the validity of Branyan's consent for the search of the apartment's spare bedroom. Specifically, Fuller argues that he was an overnight guest in Branyan's apartment and spent most of his time in the spare bedroom with the door closed. Consequently, Fuller claims, Branyan lacked authority to consent to a search of the spare bedroom that revealed the presence of the computer and led to the search warrant. There is support for defendant's contention that, as an overnight guest, he had an expectation of privacy that gives him standing to challenge the search. *Minnesota* [redacted]

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Olson, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). Nonetheless, a warrantless search does not violate the Fourth Amendment if police have " consent to search from one who possesses common authority over the premises with the absent non-consenting target of the search." *United States* [redacted] *Clutter,* 914 F.2d 775, 777 (6th Cir.1990) (citing *United States* [redacted] *Matlock,* 415 U.S. 164, 169, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). The record supports the district court's finding that Branyan, as the lessee, had authority to consent to the search of the spare bedroom.[FN4]

FN4. The district court observed that "the lessee's consent to the instant search of the spare bedroom provides an independent reason to deny the Defendant's motion to suppress. *See United States* [redacted] 979 F.2d 77, 79 (6th Cir.1992); *United States* [redacted] *Clutter,* 914 F.2d 775, 777 (6th Cir.1990), *cert. denied,*499 U.S. 947, 111 S.Ct. 1413, 113 L.Ed.2d 466 (1991) (citing *United States* [redacted] *Matlock,* 415 U.S. 164, 169, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974))." Moreover, even if the government could not show Branyan's consent was valid, a warrantless entry does not violate the Fourth Amendment when it is based on consent from a third party whom the agents reasonably believed (even if erroneously) to have common authority over the premises. *United States* [redacted] 979 F.2d 77, 79 (6th Cir.1992) (quoting *Illinois* [redacted] *Rodriguez,* 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990)).

B. Attempted Enticement of A Minor

****5** Count 1 of the indictment charged that between July 12 and July 20, 2000, James Stanley Fuller, using **facilities** and means of interstate and foreign **commerce**, that is, computerized access to the Internet and **telephones**, did knowingly attempt to persuade, induce, entice, and coerce an individual who had not attained the age of 18 years, that is, a thirteen (13) year old girl, to engage in sexual activity, as defined in Title 18, Section 2246, United States Code, for which ***378** JAMES STANLEY FULLER, a.k.a. JAMES STANLEY, a.k.a. STAN FULLER, a.k.a. BLUEEY0123, a.k.a. K9TEACHER01, can be charged with a criminal offense under Title 18, Section 2243, United States Code, under Ohio Revised Code Sections 2907.04(A), 2907.06(A)(4), and 2907.07(C), and under Code of Georgia Sections 16-6-2, 16-6-3, and 16-6-4; all in violation of Title 18, United States Code, Section **2422(b)**.

Fuller argues that the government offered no proof that the victim was in fact a minor, that any sexual activity occurred, or that there was the necessary nexus to interstate or foreign **commerce**.[FN5]

FN5. Fuller also argues that the indictment was jurisdictionally deficient because it refers to offenses for which he *can be* charged. On the contrary, the indictment clearly charges Fuller, in language that parallels the statute, with attempted enticement of a minor to engage in sexual activity for which he could be charged under state law. *See*18 U.S.C. § 2422(b).

[4] First, Fuller asserts that both the minor age of the victim and a sexual act are elements of the charged offense. This claim is meritless. This statute, as amended in 1998 to add "or attempts to do so," criminalizes both the enticement and the attempted enticement, but not the actual performance of the sexual activity. *United States* [redacted] *Bailey,* 228 F.3d 637, 639 (6th Cir.2000) (intent to commit the sexual act is not required to prove attempt to persuade a minor to engage in sexual activity), *cert. denied,*532 U.S. 1009, 121 S.Ct. 1737, 149 L.Ed.2d 661 (2001).

Further, as the district court found in denying Fuller's motion to dismiss count 1, a defendant may be charged with knowingly attempting to persuade, induce, entice, or coerce a minor to engage in sexual activity even though he is mistaken as to the true age of the person with whom he admittedly communicated. Several courts have specifically held that a defendant may be convicted of attempted persuasion or enticement of a minor even though

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the defendant had been communicating with an adult FBI agent posing as a minor. *See, e.g., United States v. Root,* 296 F.3d 1222 (11th Cir.2002), *cert. denied,*537 U.S. 1176, 123 S.Ct. 1006, 154 L.Ed.2d 921 (2003); *United States v. Farner,* 251 F.3d 510 (5th Cir.2001); *United States v. [redacted],* 102 F.Supp.2d 946, 948 (N.D.Ill.2000). [FN6]

FN6. Although not fully developed, Fuller also seems to be arguing that there was insufficient evidence to support a finding that he believed he was communicating with a minor. Fuller specifically refers to evidence that, during their final telephone conversation on July 20, Liberti indicated she was "almost 14," "14 going on 18," " going on 21," and then assented when Fuller responded: "That's what I want to hear ... you're 21 as far as I'm concerned." While neither party discusses whether Fuller preserved such a challenge by moving for judgment of acquittal at the close of the proofs, we need only examine the transcripts of the IM sessions and telephone calls to be more than satisfied that there was sufficient evidence from which a rational trier of fact could find Fuller believed he was communicating with a minor.

Finally, defendant seems to argue that the government failed to prove the interstate commerce element of the offense because telephone calls to internet service providers (ISP) made within the caller's local calling area are "local calls" for reciprocal compensation arrangements under the Telecommunications Act of 1996. *See Bell Atl. Tel. Cos. v. FCC,* 206 F.3d 1 (D.C.Cir.2000) (vacating FCC ruling that such calls were not local because they extend beyond the ISP to out-of-state web sites). The "local call" designation for compensation purposes does not control this issue.

****6** The statute requires that the defendant have used "the mail or any **facility** or ***379** means of interstate or foreign **commerce**" to commit the offense of attempted persuasion or enticement. 18 U.S.C. § **2422(b)**. While there was evidence that all communications initiated by customers using AOL were routed through one of three **facilities** located in [redacted] before being delivered to the recipient, the interstate **commerce** connection was established in this case by indisputable evidence that Fuller used both the Internet and the **telephone**, **facilities** or means of interstate **commerce**, in committing the offense.[FN7]

FN7. Fuller also asserts that because counts 1 and 3 refer to interstate *and* foreign commerce, the government was required to prove both. We find no error in this regard.

C. Counts 2, 3, and 4

Seeking reversal of his convictions on counts 2, 3, and 4, Fuller argues-both through counsel and in his *pro se* pleadings-that these convictions were invalidated by *Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002), because the government failed to prove that the visual depictions were of "real" children as opposed to virtual, computer-generated images that "appeared to be" children.

Decided several months after Fuller was sentenced, the Court in *Free Speech Coalition* struck down, as overbroad and unconstitutional, two provisions added by the Child Pornography Prevention Act of 1996 (CPPA). Those two provisions expanded the definition of child pornography to include: any visual depiction, including (1) a computer generated image, that "is, *or appears to be,* of a minor engaging in sexually explicit conduct,"18 U.S.C. § 2256(8)(B) (emphasis added); and (2) any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression"* of depicting " a minor engaging in sexually explicit conduct,"18 U.S.C. § 2256(8)(D) (emphasis added). The Court held that by encompassing "virtual" child pornography that involved no real children these definitions violated the First Amendment because they proscribed "a significant universe of speech that is neither obscene under [redacted] nor child

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pornography under *Ferber." Free Speech Coalition,*535 U.S. at 1396, 122 S.Ct. 1751 (referencing [redacted] *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and *New York* [redacted] *Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)).

[5] To the extent that Fuller's claim can be understood to argue that his convictions could have been based on an unconstitutional definition of child pornography, we find no danger of this was presented here because Fuller's convictions were for violations of 18 U.S.C. § 2252(a)(1) and (a)(4)(B). These sections each require proof both that "the producing of such visual depiction involves the use of a minor engaged in sexually explicit conduct" and that "such visual depiction is of such conduct." 18 U.S.C. § 2252(a)(1)(A) and (B) and 2252(a)(4)(B)(i) and (ii). These elements correspond to the definition of child pornography that predated the CPPA amendments, now found in 18 U.S.C. § 2256(8)(A), which was not invalidated by the Court in *Free Speech Coalition. Free Speech Coalition,*535 U.S. at 1397, 122 S.Ct. 1751; *see also United States* [redacted] *Kelly,* 314 F.3d 908, 911-13 (7th Cir.), *cert. denied,*538 U.S. 1001, 123 S.Ct. 1923, 155 L.Ed.2d 829 (2003). As a result, we find Fuller's convictions on counts 2, 3, and 4 were not rendered unconstitutional by *Free Speech Coalition. Accord United States* [redacted] *Deaton,* 328 F.3d 454, 455 (8th Cir.2003) (upholding conviction under § 2252(a)(4)(B)).[FN8]

FN8. To the extent that defendant may rely on recent cases applying *Free Speech Coalition* to child pornography convictions under a related statute, 18 U.S.C. § 2252A, those cases must be distinguished because § 2252A incorporates the statutory definition of child pornography, including those provisions struck down by the Supreme Court, and the jury was instructed accordingly. *United States* [redacted] *Ellyson,* 326 F.3d 522 (4th Cir.2003) (reversing conviction under § 2252A(a)(5)(B) where issue was preserved). On plain error review, however, some courts have found the error did not affect the defendant's substantial rights because there was no evidence that the depictions were anything other than of "actual" minors. *See, e.g., Kelly,* 314 F.3d at 911 (affirming conviction under § 2252A(a)(5)(B) because defendant possessed "real" child pornography); *United States* [redacted] 312 F.3d 1250, 1259 n. 11 (11th Cir.2002), *cert. denied,*538 U.S. 954, 123 S.Ct. 1646, 155 L.Ed.2d 502 (2003) (affirming because erroneous instructions did not affect defendant's substantial rights where no one claimed that the images were of virtual children).

***380 **7** Next, without identifying this claim as a challenge to the sufficiency of the evidence. defendant nonetheless argues that the government's proofs were insufficient to support a finding that the visual depictions were produced using "actual" minors. In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* [redacted] *Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).[FN9]

FN9. Because the government does not argue that our review is for plain error, we assume such a challenge to the sufficiency of the evidence was preserved by motion for judgment of acquittal at the close of the evidence. Neither party, however, has indicated whether that was in fact the case.

[6] In particular, defendant argues that although Dr. Rogers testified concerning the developmental stages of the depicted minors, he conceded that he was not an expert in computers and could not determine whether the images were computerized or were of real minors. When asked if he could tell whether the pictures on defendant's computer were of actual people, Grummow testified that some of the pictures were of the defendant and other known persons and that the visual depictions of child pornography "appeared to be" live human beings.

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Finally, defendant relies on the statement by Rehman, the expert in computer forensics and child exploitation, that: "All of the images appear to have real children in them." When read in context, however, and in the absence of any evidence that the images were computer-generated or "virtual" child pornography, it is clear that there was sufficient evidence that actual minors were involved in the production of the images.

Significantly, no contrary evidence was offered to suggest either that any of the visual depictions were computer generated, or that they were not produced using actual minors. Having not only heard the above testimony, but also having viewed the images in question, the jury was in a position to draw its own conclusions about whether they depicted actual children. *Deaton,* 328 F.3d at 455 (jury's conclusion that real children were depicted may be upheld even when the only evidence offered was the images themselves); *see also United States* [redacted] *Vig,* 167 F.3d 443, 449-50 (8th Cir.1999) (where defendant simply argues that images may or may not be of real children, the government is not required to negate as part of its proofs the unsupported speculation).[FN10]

FN10. Fuller's *pro se* pleadings also assert that the government failed to meet its burden of proving that he was personally involved in the production of the images. As the district court observed in denying one of defendant's motions to dismiss, Fuller was not charged with manufacture or production of child pornography, proscribed by 18 U.S.C. § 2251, but rather with transportation and possession of child pornography in interstate or foreign commerce in violation of 18 U.S.C. § 2252 , which does not require that the named defendant be involved in any way in the production of the visual depiction. *See United States* [redacted] *Tidwell,* No. 89-5880, 1990 WL 170432, *2 (6th Cir. Nov.6, 1990) (unpublished disposition) (discussing differences between §§ 2251 and 2252 for double jeopardy purposes).

***381** D. Sentencing

Fuller, having decided to represent himself at sentencing, filed numerous objections to the probation department's calculation of the guideline range. Each of the objections was specifically identified and responded to in a written addendum to the presentence report. Due to certain objections and some new information, the probation department reduced both the total offense level (from 36 to 34) and the criminal history category (from III to II). As an initial matter at the time of sentencing, the district judge took up and rejected the recommended 2-level enhancement for obstruction of justice. Then, after making clear that he had carefully reviewed every one of the defendant's objections, the court indicated that no further argument was necessary with respect to the objections already made, overruled those objections without specific discussion, and accepted the probation department's calculation of the offense levels under United States Sentencing Guidelines Manual (USSG) §§ 2G2.1 and 2G2.2 (1998).[FN11]

FN11. The 1998 edition of the United States Sentencing Guidelines Manual was applied in this case due to concerns about possible *ex post facto* problems that might arise from subsequent amendments to the relevant guideline provisions.

****8** Without challenging the guideline calculations themselves, defendant argues that the district court erred by applying enhancements for specific offense characteristics without making factual findings required by Fed.R.Crim.P. 32(c)(1). Despite the government's reliance on the context of the proceedings and the colloquy with the court at sentencing, the record is clear that the district court overruled defendant's objections to the enhancements without articulating the reasons for doing so. As we explain more fully below, we only affirm because we conclude that the denials asserted in the form of objections to the sentencing enhancements did not present a controverted or disputed matter for which findings were required. Even so, we cannot help but observe that this issue could easily have been avoided if the district court

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had just addressed each of the enhancements in turn and stated the basis for finding that it should be applied in this case.

At the time of sentencing, Rule 32(c)(1) (2001) stated that: "For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." FN12 " Because the purpose of the rule is to ensure that sentencing is based on reliable facts found by the court itself after deliberation, a court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence." *United States* [redacted] *Tarwater,* 308 F.3d 494, 518 (6th Cir.2002) (citing *United States* [redacted] *Corrado,* 227 F.3d 528, 540 (6th Cir.2000)). This court has required "literal compliance" with this rule. *United States* [redacted] *Tackett,* 113 F.3d 603, 613 (6th Cir.1997).

FN12. This provision was replaced, effective December 1, 2002, with Fed.R.Crim.P. 32(i)(3) (2003), which clarifies that the sentencing court "may accept any undisputed portion of the presentence report as a finding of fact."

***382** The requirement of literal compliance, however, assumes that the objections raise a matter which is *controverted.* For example, in *United States* [redacted] *Treadway,* 328 F.3d 878, 885-86 (6th Cir.2003), *petition for cert. filed,*No. 02-11197, --- U.S.L.W. ---- (U.S. June 9, 2003), where the defendant had not objected, orally or in writing, to the drug quantity calculation, this court found "no reason to require a district court to make independent findings outside the PSR when the facts are undisputed." *Id.* at 886. Even an objection that represents a bare denial or "bare bones" assertion of a factual dispute will not give rise to a dispute within the meaning of Rule 32 unless the defendant produces some evidence that calls the reliability or correctness of the alleged facts into question. *United States* [redacted] *Lang,* 333 F.3d 678, 681 (6th Cir.2003) (agreeing with *United States* [redacted] *Mustread,* 42 F.3d 1097, 1102 (7th Cir.1994)).

Defendant claims error in the district court's overruling of his objections to the enhancements imposed for the following specific offense characteristics: (1) "the material involved a prepubescent minor or a minor under the age of twelve years" (2 levels); (2) "the offense involved distribution" (5 levels); (3) "the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence" (4 levels); and (4) "a computer was used for the transmission of the material" (2 levels). USSG § 2G2.2(b)(1), (2), (3), and (5) (1998). The critical question is whether the objections placed any of these matters in controversy for purposes of Rule 32.

1. Prepubescent Minor

****9** [7] Fuller's objection to the first enhancement was that the government had failed to prove at trial that he had sent or received any visual depiction involving a prepubescent minor or a minor under the age of twelve years. As outlined above, however, Fuller offered no evidence at trial to dispute the testimony of Dr. Rogers that 21 images were of minors and that 13 of those images were of minors at a developmental stage for which the average age was 10 years. The only challenge to that testimony was the speculation, raised by cross-examination, that the images were not of "real " children. The fact that "real" children had been used was established by defendant's convictions on counts 2, 3, and 4. Thus, defendant's denial in this regard did not create a dispute as to any fact and the applicability of this specific offense characteristic cannot be said to have been reasonably controverted.

2. Use of Computer

Similarly, Fuller objected to the fourth enhancement on the grounds that the government offered no evidence that he used a computer to send or receive material that involved a minor engaging in sexually explicit conduct for the purpose of producing a visual depiction of such conduct. This objection mirrors the arguments defendant made in

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challenging the sufficiency of the evidence to support his convictions on counts 2, 3, and 4, but does not deny that "a computer was used for the transmission of the material" as is required for the enhancement under § 2G2.2(b)(5).

[8] Because defendant's conviction on count 3 required proof that he transmitted child pornography by computer, application of this enhancement for that offense cannot be contested. In addition, this court has recently adopted the Seventh Circuit's interpretation of this enhancement as applying equally to material that is either shipped by the defendant or received by the defendant as long as a computer was used for the transmission of the ***383** material. *United States* [redacted] *Boyd,* 312 F.3d 213, 216 (6th Cir.2002) (following *United States* [redacted] *Richardson,* 238 F.3d 837, 839 (7th Cir.2001)). The evidence at trial showed that child pornography was not only sent to Liberti, but was downloaded to defendant's computer from the Internet. Not only was this enhancement required by the convictions on counts 3 and 4, but defendant did not directly dispute the factual basis at sentencing.

3. Distribution

Fuller objected to the enhancement under § 2G2.2(b)(2), which applied if the offense involved distribution. The application notes define " distribution" to *include*"any act related to distribution for pecuniary gain, including, production, transportation, and possession with intent to distribute." USSG § 2G2.2, comment. (n.1) (1998). Denying that he gave any visual depiction to anyone, defendant also objected on the grounds that there was no evidence of distribution for any pecuniary gain.

[9] Although courts have differed on the issue, this court has followed the Fifth Circuit's lead and held that this enhancement encompasses distribution for pecuniary gain, but does not exclude distribution for any other purpose. *United States* [redacted] *Hibbler,* 159 F.3d 233, 237-38 (6th Cir.1998) (trading child pornography over the Internet was distribution for " value") (following *United States* [redacted] *Canada,* 110 F.3d 260, 263 (5th Cir.1997)). *But see United States* [redacted] *Laney,* 189 F.3d 954 (9th Cir.1999) (pecuniary gain required). In fact, the Fifth Circuit in *Canada* found that the defendant's distribution of material involving the sexual exploitation of minors with a purpose of enticing another to have sex with him was sufficient to trigger the enhancement. 110 F.3d at 263. In this case, nothing in the record contradicted the evidence that Fuller transmitted child pornography as part of his attempt to entice a minor into sexual activity. Nor did defendant's objections create a disputed question on the issue. FN13

FN13. This guideline provision was substantially amended effective November 1, 2000, to clarify that the enhancement applies to distribution for pecuniary gain; distribution for the receipt, or expectation of receipt, of a thing of value; distribution to a minor; distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of a minor to engage in prohibited sexual conduct; and distribution other than that specifically enumerated. USSG § 2G2.2(b)(2)(A)-(E) (2000).

4. Sadistic or Masochistic Conduct

****10** Finally, objecting to the 4-level enhancement under § 2G2.2(b)(3), Fuller stated generally that the government had not charged or proved an offense that involved depictions being sent or received by computer that portrayed "sadistic or masochistic conduct or other depictions of violence." This general denial does not create a factual dispute concerning the depictions, all of which were admitted into evidence and viewed by the district court, or present a controverted matter concerning the application of this enhancement.

Although the guidelines themselves do not define what is meant by sadistic, masochistic, or violent depictions, courts must look to the common meaning of these terms to determine their application. *See, e.g., United States* [redacted] *Parker,* 267 F.3d 839, 847 (8th Cir.2001), *cert. denied,*535 U.S. 1011, 122 S.Ct. 1592, 152 L.Ed.2d 509 (2002);

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United States [redacted] *Lyckman,* 235 F.3d 234, 237-40 (5th Cir.2000). The term "sadism," which is the most relevant to this case, is defined as the " infliction of pain upon a love object as a means of obtaining sexual release." *Lyckman,* 235 F.3d at 238 n. 19 (citation omitted). Construing***384** the terms "sadistic conduct" and "other depictions of violence" in the context of cases involving child pornography, courts have found the enhancement is warranted when the offense involves the depiction of a sexual act that is "likely to cause pain in one so young." *Lyckman,* 235 F.3d at 238-39.

A number of courts have found that images displaying vaginal or anal penetration of a prepubescent minor by either an adult male or a foreign object is likely to be painful and constitutes "sadistic conduct" that justifies the enhancement. *See, e.g.,* [redacted] 312 F.3d at 1261-63; *Parker,* 267 F.3d at 847; *Lyckman,* 235 F.3d at 238-39; *Canada,* 110 F.3d at 264; *United States* [redacted] *Caldwell,* No. 97-5618, 1999 WL 238655, *9 (6th Cir. Apr.13, 1999) (unpublished disposition). One circuit has specifically held that the government need not present expert medical evidence to prove such acts would be painful to a young child. [redacted], 312 F.3d at 1262.

[10] As the government aptly observes on appeal, the pictures found on defendant's computer included images of sexual penetration of prepubescent girls that present sufficient basis to find the material portrayed images of "sadistic conduct" justifying the 4-level enhancement.[FN14] Defendant's general objection did not dispute that pictures found on his computer included images that portrayed sexual penetration of prepubescent girls that would likely be painful. Nor did defendant present a legal controversy about the definition of sadistic conduct for purposes of the enhancement. As a result, the district court's failure to specify the reasons for applying the enhancement was not error.[FN15]

FN14. Government Exhibit 133 included two pictures entitled "Creempuff4u ... bottle.bmp" and "Creempuff4u ... fucking bottle.bmp." Also, Government's Exhibits 110, 113, 117, and 122 were entitled " !!!!!!!preteen gets it in the ass.bmp," "12 year old getting fucked.bmp," " familyfun.jpg," and "preteen.21.bmp."

FN15. As a result, we express no opinion with respect to the government's further contention on appeal that the enhancement under § 2G2.2(b)(3) may be based on images of bondage or bestiality that were not identified as child pornography. (Government Exhibits 128 to 132 were entitled: "strapped to chairpussy.bmp," " bondage.jpg," "slave.1.bmp," and " slave.2.bmp.") We note, however, that the decision relied on by the government to support this proposition rested on the interplay of the sentencing guidelines and a determination of relevant conduct where the convictions involved a common scheme to distribute both obscene material that depicted adults involved in sadomasochistic conduct and sexually explicit child pornography that did not involve either violence or sadism. *United States* [redacted] *Schultz,* 970 F.2d 960 (1st Cir.1992).

AFFIRMED.

C.A.6 (Ohio),2003.
U.S. [redacted]. Fuller
77 Fed.Appx. 371, 2003 WL 22331999 (C.A.6 (Ohio))

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Not Reported in F.Supp.2d, 2003 WL 22118983 (D.N.D.)
(Cite as: Not Reported in F.Supp.2d)

H

U.S. [redacted]. Patten
D.N.D.,2003.
Only the Westlaw citation is currently available.
United States District Court,D. North Dakota,Southeastern Division.
UNITED STATES of America, Plaintiff,
v.
Casey Scott PATTEN, Defendant.
Criminal File No. C3-03-44.

July 28, 2003.

Christopher J. Lancaster, Stefanson Plambeck Foss & Fisher, Moorhead, MN, for Defendant.

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS AND DENYING MOTION FOR A BILL OF PARTICULARS

RALPH R. ERICKSON, District Judge.

***1** Before the Court is Defendant's Motion to Dismiss and for Bill of Particulars (doc. # 13). The United States filed a brief in opposition (doc. # 14). Defendant filed a reply brief (doc. # 19). The United States then requested the leave of Court to file an additional brief relating to an issue of first impression (doc. # 20). The Court granted that request and accepted the United States' additional brief (doc. # 22) and allowed Defendant to file an additional brief (doc. # 24).

STATEMENT OF FACTS

On February 16, 2003, the defendant, Casey Patten, logged onto a Yahoo chat room using the screen name "got2run400." He had a conversation with someone using the screen name "ndblondie2003." At the start of the conversation, ndblondie2003 identified herself as a sixteen-year-old female who lived in Fargo.[FN1]Defendant told her that he was twenty-six and asked her if he was too old. Ndblondie2003 replied that she had dated older guys before.

FN1. In reality, ndblondie2003 was West Fargo Police Officer Al Schmidt.

Defendant then discussed sexual matters with ndblondie2003. He asked her what sexual position she preferred and what type of sexual things she would allow a guy do to her. At the end of this conversation, Defendant asked her if she would want to "hook up sometime?" The two then agreed that they would talk on the phone first.

Later that same day, Defendant talked to ndblondie2003 in the Yahoo chat room again. Defendant asked "Can you and I get drunk this week?"After discussing what kind of liquor nodblondie2003 liked, she stated "we could hook up this week."

The next day, West Fargo Police Dispatcher Brandi Gunderson posed as ndblondie2003 and called Defendant. They arranged to meet in the parking lot of the West Fargo Sunmart store. Defendant stated that he would be driving a white Blazer with big headlights. When Defendant arrived in the Sunmart parking lot in the white Blazer, Officer Schmidt arrested him.

ANALYSIS

The grand jury indicted Defendant with luring a minor via the internet, in violation of 18 U.S.C. § 2422(b). At the time of the instant offense, that statute read:
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

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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 more than 15 years, or both.

18 U.S.C. § 2422(b)(1998).[FN2]

FN2. The statute was amended in April 2003 to add a minimum mandatory sentence of five years and increase the maximum term of imprisonment to thirty years. 18 U.S.C. § 2422(b)(2003).

I. Motion to Dismiss

"Unless there is a stipulated record, or unless immunity issues are implicated, a pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government's evidence."*United States* [redacted] *DeLaurentis,* 230 F.3d 659, 660-61 (3d Cir.2000) (citing *United States* [redacted] *Knox,* 396 U.S. 77, 83 n. 7 (1969)). There is no corollary in criminal cases to a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Id.* at 661.The government is entitled to present all of its evidence at trial and then have its sufficiency tested by a motion for acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. *Id.*

***2** Defendant argues that the government lacks any proof on three of the essential elements of this crime. First, Defendant argues that he never attempted to persuade, induce, entice, or coerce ndblondie2003 into engaging in sexual activity. The evidence submitted to the Court demonstrates that shortly after finding out that ndblondie2003 was a sixteen-year-old female living in Fargo, Defendant asked if he was too old for her and then engaged in a discussion with her about sex acts and what kinds of sexual things she would do with a man. Following that discussion, Defendant asked her if she would like to hook up. Whether this conversation or other portions of the conversations [FN3] Defendant had with ndblondie2003 prove that he attempted to persuade, induce, entice, or coerce her into engaging in sexual activity is for a jury to decide.

FN3. Defendant appears to argue that the government could not use the subject matter of the **telephone** conversation to prove the charge in the indictment since it is not the internet. Def.'s Br. Supp. Mot. Dismiss and for Bill of Particulars at 8. However, the statute includes the use of " the mail or any **facility** or means of interstate or foreign **commerce**."18 U.S.C. § **2422(b)**(1998). The **telephone** is a **facility** of interstate **commerce**. *Kerbs* [redacted] *Fall River Indus., Inc.,* 502 F.2d 731, 738 (10th Cir.1974); *United States* [redacted] *Giordano,* No. 3:01CR216, 2002 WL 32082891 (D.Conn. July 29, 2002).

Second, Defendant argues that there is no evidence of a substantial step to prove attempt. Defendant did agree to meet with ndblondie2003 in the Sunmart parking lot in West Fargo, and he drove to that location. Whether this act, or any other evidence that the government intends to produce, constitutes a substantial step is for a jury to decide.

Finally, Defendant argues that the government cannot prove that "any sexual activity for which [he could have been] charged with a criminal offense" was about to occur. See 18 U.S.C. § 2422(b). Defendant alleges that under Minnesota law, and the United States does not dispute this, it is not a crime for a sixteen-year-old to have consensual sex with someone who is eighteen or older. However, Defendant concedes that it is a crime in North Dakota.

The United States argues that it does not have to prove that Defendant intended to have sex with ndblondie2003 in North Dakota in order to satisfy this final element of the statute. The phrase "any sexual act for which any person can be charged with a criminal offense" is a description of the intent element. *United States* [redacted] *Kufrovich,* 997 F.Supp. 246, 256 (D.Conn.1997). To satisfy this final element, the government must prove two items: 1) Defendant intended to engage in a sexual act with ndblondie2003 and 2) Defendant or ndblondie2003 could have been charged with a criminal offense for that sexual act if it had occurred. See 18 U.S.C. § 2422(b).

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The United States cites Kufrovich for the basic principle that the judge instructs the jury on the law; therefore the judge will instruct the jury on whether a sexual act violates the law. 997 F.Supp. at 256. However, when factual issues will determine which law applies, those factual issues must be determined first, see *Blome* [redacted] *Aerospatiale Helicopter Corp.,* 924 F.Supp. 805, 814 (D.Tex.1996), and the jury is the finder of fact. Assuming Defendant did intend to have sex with ndblondie2003, and did intend to have sex with her in Minnesota, then there is no " sexual act for which any person can be charged with a criminal offense" because a sixteen-year-old can have consensual sex with someone over the age of eighteen in Minnesota without either of them being charged with a criminal offense. The government will have to produce evidence that Defendant intended to engage in a sexual act with ndblondie2003 that he could be charged with if the sexual act had taken place in order to satisfy this final element. 18 U.S.C. § 2422(b).

***3** The government cites *United States* [redacted] *Brockdorff,* 992 F.Supp. 22 (D.C.1997) and *United States* [redacted] *Pelton,* 578 F.2d 701 (8th Cir.1978) for analogous support of its argument that it does not have to prove that Defendant intended to have sex with a sixteen-year-old in North Dakota. Both of these cases involve statutes that make the intended behavior itself a federal crime. See Pelton, 578 F.2d at 712 (stating that 18 U.S.C. § 2421 prohibits transporting women for prostitution, so this prohibition is not "keyed to the legality or illegality of prostitution under the law of the state where the transportation ends"); Brockdorff, 992 F.Supp. at 23 (quoting 18 U.S.C. & sect; 2423(b)(1997)) (making it illegal for a person to travel in interstate commerce for the purpose of engaging in any sexual act with someone under eighteen years of age). Since 18 U.S.C. § 2422(b) does not make it illegal for a minor to have sex with an adult, the government has to rely on some other law that makes that sexual activity illegal.

Defendant argues that the government has no proof that he was going to have sex with ndblondie2003 in North Dakota. The government will likely produce evidence at trial that ndblondie2003 told Defendant that she lived in North Dakota and that Defendant entered North Dakota to meet with ndblondie2003. Whether this evidence, or any other evidence that the government may provide at trial, demonstrates that Defendant planned on having sex with ndblondie2003 in North Dakota is for a jury to decide.

All of Defendant's arguments go to the sufficiency of the evidence. Since it is for a jury to decide whether the government has proved its case beyond a reasonable doubt, this case is not subject to dismissal. See DeLaurentis, 230 F.3d at 660-61 (citing Knox, 396 U.S. at 83 n. 7) (stating that a motion to dismiss is not the appropriate method for addressing the sufficiency of the evidence against a criminal defendant).

II. Motion for a Bill of Particulars

The decision to grant or deny a bill of particulars lies within the sound discretion of the trial court. *United States* [redacted] *Buffington,* 578 F.2d 213, 214 (8th Cir.1978) (citing United *States* [redacted] *Long,* 449 F.2d 288, 295 (8th Cir.1971)). A party must demonstrate good cause before a court will issue an order to compel or other order pertaining to discovery. See Fed.R.Crim.P. 16(d)(1) (stating that, for good cause, a court may grant appropriate relief on discovery matters). When the indictment substantially follows the words of the statute, a court does not abuse its discretion when it denies a request for a bill of particulars. *Bunn* [redacted] *United States,* 260 F.2d 313, 314 (8th Cir.1958).

In this case, the indictment substantially follows the words of the statute and informs Defendant of the charges against him with sufficient particularity to allow him to prepare his defense. Defendant has failed to show good cause for an order to compel.

DECISION

Defendant's Motion to Dismiss is DENIED and Defendant's Motion for a Bill of Particulars is DENIED.

***4** IT IS SO ORDERED.

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504 F.3d 737
504 F.3d 737, 07 Cal. Daily Op. Serv. 11,330, 2007 Daily Journal D.A.R. 14,672
(Cite as: 504 F.3d 737)

H
U.S. [redacted]. Sinerius
C.A.9 (Mont.),2007.

United States Court of Appeals,Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Arthur Emil SINERIUS, Jr., Defendant-Appellant.
No. 06-30327.

Argued and Submitted March 9, 2007.
Filed Sept. 20, 2007.

Background: Defendant was convicted in the United States District Court for the District of Montana, Charles C. Lovell, J., of receipt of child pornography and possession of child pornography, and he appealed his 180-month sentence.

Holding: The Court of Appeals, O'Scannlain, Circuit Judge, held that defendant's prior conviction under Montana law for sexual assault constituted a conviction relating to sexual abuse, for purposes of increase of defendant's statutory mandatory minimum sentences.

Affirmed.

West Headnotes

[1] Obscenity 281 ⇐18.1

281 Obscenity
281k18 Trial
281k18.1 k. In General. Most Cited Cases
Under categorical approach for determining the character of a prior conviction, defendant's prior conviction under Montana law for sexual assault constituted a conviction relating to sexual abuse, for purposes of increase of defendant's statutory mandatory minimum sentences to 15 years for receipt of child pornography and ten years for possession of child pornography; all conduct criminalized by Montana statute of conviction, which prohibited knowingly subjecting another person to sexual contact without consent, fell within ordinary, contemporary, and common meaning of term "sexual abuse," and even least egregious conduct covered by statute, ostensibly "consensual" contact between 16-year-old offender and 13-year-old victim, categorically qualified as sexual abuse. 18 U.S.C.A. § 2252A(b); MCA 45-5-502.

[2] Obscenity 281 ⇐18.1

281 Obscenity
281k18 Trial
281k18.1 k. In General. Most Cited Cases
For purposes of determination of whether defendant's prior conviction under Montana law for sexual assault constituted a conviction relating to sexual abuse, for purposes of an increase of the defendant's statutory mandatory minimum sentences to 15 years for receipt of child pornography and ten years for possession of child pornography, court of appeals was not required to define term "sexual abuse" by cross-reference to federal offense of sexual abuse, rather than by the ordinary, contemporary, and common meaning of the term. 18 U.S.C.A. §§ 2242, 2252A(b); MCA 45-5-502.

***738** Michael Donahoe, Senior Litigator, Federal Defenders of Montana, argued the cause for the defendant-appellant, and filed briefs; Anthony R. Gallagher, Federal Defender, was on the briefs.
Marcia Hurd, Assistant U.S. Attorney, Billings, MT, argued the cause for the plaintiff-appellee and filed a brief; William W. Mercer, U.S. Attorney, District of Montana, and Eric B. Wolf, Assistant U.S. Attorney, Billings, MT, were on the brief.

Appeal from the United States District Court for the District of Montana; Charles C. Lovell, District Judge, Presiding. D.C. No. CR-05-00024-CCL.

Before: B. FLETCHER, DIARMUID F. O'SCANNLAIN, and A. WALLACE TASHIMA, Circuit Judges.

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O'SCANNLAIN, Circuit Judge:

We are called upon to determine whether a federal defendant's prior conviction for "sexual assault" under Montana state law triggers an enhanced penalty under the sentencing provisions applicable to his federal crimes.

I

In 2005, Arthur Emil Sinerius, Jr. was indicted by a federal grand jury for receipt of child pornography ("Count I") and possession of child pornography ("Count II"), in violation of 18 U.S.C. §§ 2252A(a)(2) and 2252A(a)(5)(B) respectively. Sinerius subsequently pled guilty to both counts, and also agreed to forfeiture of his computer pursuant to 18 U.S.C. § 2253. The government agreed, pending the determinations of the presentence investigation report ("PSR"), to recommend a sentence at the low end of the advisory guideline range.

The PSR determined that Sinerius's base offense level was 22 and then added two levels because the material involved a prepubescent minor or a minor under the age of 12, U.S.S.G. § 2G2.2(b)(2); four levels because the offense involved material that portrays sadistic or masochistic conduct***739** or other depictions of violence, U.S.S.G. § 2G2.2(b)(4); two levels because the offense involved the use of a computer, U.S.S.G. § 2G2.2(b)(6); and four levels because the offense involved between 300 and 600 images, U.S.S.G. § 2G2.2(b)(7)(C). The PSR then subtracted two levels because Sinerius's conduct was limited to the receipt of child pornography and he did not traffic in such material, U.S.S.G. § 2G2.2(b)(1); and three levels for acceptance of responsibility, U.S.S.G. § 3E1.1. Accordingly, based on Sinerius's total offense level of 29 and Criminal History Category of II, the PSR calculated an advisory Guidelines range of 97 to 121 months. However, the PSR also determined that Sinerius's' prior conviction for sexual assault, in violation of Mont.Code Ann. § 45-5-502 (the "Montana sexual assault statute"), was a predicate offense "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward," as defined by § 2252A(b). 18 U.S.C. §§ 2252A(b)(1),(2). The PSR thus concluded that § 2252A(b) required enhanced mandatory minimum sentences of 15 years for Count I and 10 years for Count II.[FN1]

> FN1. Section 2252A(b)(1) sets forth the mandatory minimum sentence for Count I (receipt of child pornography under § 2252A(a)(2)(B)), among other offenses. Section 2252(A)(b)(2) sets forth the mandatory minimum sentence for Count II (possession of child pornography under § 2252A(a)(5)(B)). Both provisions require an enhanced sentence when the defendant has been convicted of a state offense "relating to aggravated sexual abuse, sexual abuse, or abusive conduct involving a minor or ward." §§ 2252A(b)(1),(2). Because the relevant text of both §§ 2252A(b)(1) and 2252A(b)(2) is identical, we treat the two provisions together for purposes of the issue raised by this appeal.

At his change of plea hearing, Sinerius admitted to his prior conviction and indicated that he agreed with the government's summary of the facts, including that "Sinerius is a registered sexual offender, having been convicted in Montana state court in 1994 of sexually abusing a minor female child." [FN2] Sinerius objected to the PSR, however, arguing that his prior Montana conviction did not categorically qualify as a predicate offense for enhancement purposes.

> FN2. Sinerius was originally charged with "sexual intercourse without consent," in violation of Mont.Code Ann. § 45-5-503. The information states that Sinerius, then thirty-one years old, "knowingly had sexual intercourse without consent with another person, to-wit: the defendant fondled the vaginal area of R.D., d/o/b 4-23-81, and inserted his fingers and his penis into her vagina when she was incapable of consent

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> due to her age." Subsequently, however, the Montana trial judge granted the state's motion in open court to amend the charge against Sinerius from "sexual intercourse without consent (felony)" to "sexual assault (felony)," in violation of Mont.Code Ann. § 45-5-502. The amendment was made by a handwritten interlineation on the information, striking out the former charge and replacing it with the latter. At Sinerius's federal sentencing hearing, the federal prosecutor, who, coincidentally, had also served as the state district attorney in the Montana court proceedings, stated that this amendment only changed the charged offense, not the underlying facts. No transcript of the state trial proceedings is available.

After Sinerius pled guilty to "sexual assault (felony)," the Montana trial judge sentenced him to ten years imprisonment, all but 30 days suspended, placed him on probation for ten years, and ordered him to pay a fine, register as a sex offender, and undergo treatment.

At the sentencing hearing, the district court ruled that Sinerius's Montana conviction was a predicate offense that required the enhanced mandatory minimum sentences provided by § 2252A(b) because it was an offense "relating to ... sexual abuse, or abusive sexual conduct involving a minor or ward." Relying on the prior conviction, the court sentenced Sinerius to ***740** imprisonment of 180 months for receipt of child pornography (under § 2252A(b)(1)), and 120 months for possession of child pornography (under § 2252A(b)(2)), to run concurrently. The court also sentenced Sinerius to supervised release for a term of life, and ordered him to participate in treatment and to pay an assessment.

Sinerius appeals the sentence.

II

[1] To determine whether Sinerius's conviction under the Montana sexual assault statute meets the definition of a predicate sex offense under § 2252A(b), we rely on the familiar two-step test set forth in *Taylor* [redacted] *United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). *See United States* [redacted] *Baron-Medina,* 187 F.3d 1144, 1147 (9th Cir.1999) (employing *Taylor*'s categorical approach to interpret the phrase "sexual abuse of a minor" in 8 U.S.C. § 1101(a)(43)); *see also United States* [redacted] *Romm,* 455 F.3d 990, 1005 (9th Cir.2006) (recognizing the parties' agreement that *Taylor*'s categorical approach applies to a sentence enhancement under § 2252A(b)).

First, we examine the definition of the predicate offense in the federal statute. *See United States* [redacted] [redacted]*-Solis,* 447 F.3d 1201, 1206 (9th Cir.2006). Section 2252A(b) imposes an enhanced sentence on a defendant "if such person has a prior conviction ... under the laws of any State *relating to* aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252A(b)(1),(2) (emphasis added). Thus, the relevant offenses under § 2252A(b) are those "relating to ... aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." *See* [redacted]*-Solis,* 447 F.3d at 1206.

Next, we look to the Montana sexual assault statute and compare its elements to the definition of the terms "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor" under § 2252A(b). [redacted]*-Solis,* 447 F.3d at 1206. Under this categorical approach, Sinerius's Montana conviction will qualify as a predicate sex offense only if the full range of conduct covered by the Montana statute falls within the meaning of those terms. *Id.*

A

Section 2252A(b) requires an enhanced sentence if Sinerius's Montana conviction is as an offense "relating to" either "aggravated sexual ab-

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use," "sexual abuse," or "abusive sexual conduct involving a minor." We first consider whether Sinerius's conviction is an offense "relating to ... sexual abuse."

Under the categorical approach, we follow our common practice in cases involving non-traditional offenses by defining the offense based on the "ordinary, contemporary, and common meaning of the statutory words." *See* [redacted]*-Solis,* 447 F.3d at 1206-07 (citation omitted) (defining "sexual abuse of a minor" for purposes of the predicate offense under U.S.S.G. § 2L1.2).

We define the term "sexual abuse" by coupling the dictionary definition of "abuse" with the common understanding of "sexual." *See id.* at 1207; *Baron-Medina,* 187 F.3d at 1146. First, in the context of the Sentencing Guidelines, we have defined "abuse" to mean "misuse ... to use or treat so as to injure, hurt, or damage ... to commit indecent assault on." *Id.* at 1207; *United States* [redacted] *Pallares-Galan,* 359 F.3d 1088, 1100 (9th Cir.2004) (quoting Webster's Third New Int'l Dictionary 8 (3d ed.1981)). We have explained that this definition "encompass[es] behavior that is harmful emotionally and physically." [redacted]*Solis,* 447 F.3d at 1207. Second, we ***741** have given the term "sexual" its ordinary and commonsense meaning. *See id.* Equipped with this understanding of § 2252A(b)'s definition of a predicate offense, we next consider the Montana statute under which Sinerius was convicted.

B

Under the categorical approach, we look only to the fact of Sinerius's prior conviction and the elements of the Montana offense to determine whether § 2252A(b)'s definition of "sexual abuse" covers the full scope the conduct prohibited by the Montana sexual assault statute. *Id.* at 1206.

1

The Montana statute undeniably proscribes acts that are "sexual" in nature. Mont.Code Ann. § 45-5-502. The statute prohibits knowingly subjecting "another person to any sexual contact without consent." *Id.* § 45-5-502(1). The relevant definitional provision describes "sexual contact" as "any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party." *Id.* § 45-2-101(60). In addition, the range of conduct the Montana statute proscribes is "abusive" because it necessarily involves physical "contact *without consent.*" *Id.* § 45-5-502(1) (emphasis added). The physical touching of another person's sexual or intimate parts, for the purposes of sexual arousal or gratification and without consent, amounts to an "indecent assault on" that person. [redacted]*-Solis,* 447 F.3d at 1207.

Nevertheless, Sinerius maintains that the Montana statute is over-inclusive vis-a-vis the offenses described in § 2252A(b) and, as a consequence, that his conviction therefore cannot categorically qualify as a predicate offense.

Under the categorical approach, even the least egregious conduct proscribed by the Montana statute must qualify as an offense "relating to ... sexual abuse." *See id.* at 1206-07; *Valencia* [redacted] *Gonzales,* 439 F.3d 1046, 1052 & n. 3 (9th Cir.2006). If such conduct does not qualify, the Montana statute is over-inclusive on its face.

The Montana statute provides that a victim less than 14 years old cannot consent to sexual contact if the offender's age exceeds his or her own by three or more years. Mont.Code Ann. § 45-5-502(5). Thus, one might consider the least egregious conduct proscribed by the Montana statute to involve ostensibly "consensual" sexual contact between a 16-year-old offender and a 13-year-old victim, but for the fact that the statute negates the victim's ability to consent. Even so, we have previously concluded this precise conduct constitutes sexual abuse. In *Baron-Medina,* we held that touching the body of a child under 14 years old with sexual in-

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tent, even when it is "innocently and warmly received ... indisputably falls within the common, everyday meaning of the words 'sexual' and 'minor' " and that such "use of young children for the gratification of sexual desires constitutes an *abuse.*" 187 F.3d at 1147 (emphasis added); *see also id.* ("The use of young children as objects of sexual gratification is corrupt, improper, and contrary to good order. It constitutes maltreatment, no matter its form."(citations omitted) (internal quotation marks omitted)).

As a consequence, even the least egregious conduct proscribed by the Montana statute, consensual sexual contact by a 16-year-old on a 13-year-old victim, categorically qualifies as "sexual abuse." Further, because the statute requires the victim to be under 14 years of age to render her consent ineffective, our conclusion is consistent with our decisions in [redacted]*-Solis* ***742** and *United States* [redacted] *Baza-Martinez,* 464 F.3d 1010 (9th Cir.2006), holding that more expansive state statutes were not predicate offenses within the definition of the term "sexual abuse of a minor."

In [redacted]*-Solis,* we held that a conviction under a state statutory rape statute did not qualify as "sexual abuse of a minor" because the statute prohibited "consensual penetration of a victim just under 18 years of age by a 22-year-old perpetrator." 447 F.3d at 1207. We concluded that this conduct did not categorically include the necessary physical or psychological injury required by the term "abuse," indicating that "prior case law-as well as common sense-suggest that, while consensual underage sex may be harmful to a young teen, it may not be harmful to an older one." *Id.* at 1208 (citing *United States* [redacted] *Melton,* 344 F.3d 1021, 1028-29 (9th Cir.2003)) (suggesting that only in the presence of certain aggravating factors, such as incest, will a sexual encounter between a 17 year old and an adult necessarily create a "situation of [psychological] dominance and control"). Similarly, in *Baza-Martinez,* we concluded that a state statute prohibiting "indecent liberties with a child" did not qualify as "sexual abuse of a minor," because it prohibited a very broad range of conduct, including "mere words." 464 F.3d at 1016-17 ("All that is required is that at the time of the immoral, improper, or indecent liberty, the defendant must be in either the actual or constructive presence of the child."(internal quotation marks and citations omitted)).

In contrast to the statutes at issue in [redacted]*-Solis* and *Baza-Martinez,* the Montana sexual assault statute proscribes a narrower range of conduct, all of which necessarily involves "sexual abuse" under its ordinary and common meaning.

2

[2] Sinerius argues, however, that § 2252A(b) requires us to define the term "sexual abuse" by cross-reference to the federal offense of "sexual abuse" under 18 U.S.C. § 2242 rather than by the ordinary and common meaning of that phrase.[FN3] Section 2242 proscribes a narrower range of conduct than the Montana sexual assault statute. Specifically, Sinerius argues that "sexual abuse" under § 2242 requires skin-to-skin contact, whereas "sexual assault" under the Montana statute only requires "offensive touching of a intimate body part," which could include touching through clothing. Mont.Code Ann. § 45-2-101. Consequently, Sinerius contends that his conviction under the Montana statute cannot qualify, categorically, as a predicate offense "relating to ... sexual abuse" under § 2252A(b). We disagree.

FN3. Sinerius offers an identical argument with respect to the other terms in § 2252A(b). He asks us to define "aggravated sexual abuse" by cross-reference to the federal offense of "aggravated sexual abuse" under 18 U.S.C. § 2241, and "abusive sexual conduct involving a minor or ward" by cross-reference to the federal offenses of "sexual abuse of a minor or ward" under 18 U.S.C.

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> § 2243 and "abusive sexual contact" under 18 U.S.C. § 2244. We decline to interpret these terms by cross-reference to the cited federal crimes for the same reasons we decline to interpret the term "sexual abuse" in such manner.

We have never defined predicate sex offenses under § 2252A by cross reference to the federal provisions Sinerius cites, nor has any other court of appeals. *See United States [redacted] Hubbard,* 480 F.3d 341, 348 (5th Cir.2007) (construing "aggravated sexual abuse, sexual abuse, [and] abusive sexual conduct involving a minor" under § 2252A(b)(1) as "generic offenses"); *Rezin,* 322 F.3d at 447-48 (reaching the same conclusion in construing materially indistinguishable language in § 2252). Our reasons for declining to do so derive from ***743** well-established principles of statutory interpretation. First, the federal crime of "sexual abuse" under § 2242 is not a definitional provision applicable to § 2252A. Section 2252A is codified in title 18, chapter 110. The definitions applicable to chapter 110 are located in 18 U.S.C. § 2256. Section 2242, on the other hand, is located in chapter 109A.

While Congress did not provide a specific definition of "sexual abuse" in § 2256, we believe its decision not to do so reflects Congress's intent to define "sexual abuse" as a generic offense, understood by its ordinary and common meaning, *see* [redacted]*-Solis,* 447 F.3d at 1206-07, rather than to import the elements of offenses delineated elsewhere in the U.S.Code. *See Hubbard,* 480 F.3d at 348.

Our conclusion is strengthened by the plain language of § 2252A. That section specifically accounts for the federal crime of "sexual abuse" under § 2242 in a separate category of predicate offenses. Section 2252A(b) requires an enhanced sentence if the defendant "has a prior conviction under ... chapter 109A ...*or* under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 18 U.S.C. § 2252A(b)(1),(2) (emphasis added). Thus, § 2252A(b) treats federal offenses located in chapter 109A (which includes sexual abuse under § 2242) as a separate category of predicate offenses, independent from its treatment of state law convictions like the one at issue here.

Further, § 2252A employs broader language when defining state convictions that qualify as a predicate sex offenses than it does when defining predicate federal offenses, such as those located in chapter 109A. An individual must be convicted of the specific federal offense listed to be subject to an enhanced sentence. However, such individual need only be convicted of a state offense "*relating to...* sexual abuse" to have the same penalty imposed. 18 U.S.C. § 2252A(b)(1),(2) (emphasis added). The phrase "relating to," as defined by the Supreme Court, means "to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales [redacted] Trans World Airlines,* 504 U.S. 374, 383, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) (quoting Black's Law Dictionary 1128 (5th ed.1979)) (construing "relating to" in a different statutory context). We have construed "relating to" language broadly in the past, *see Luu-Le [redacted] INS,* 224 F.3d 911, 915-16 (interpreting the phrase "relating to a controlled substance" in section 241(a)(2)(B)(i) of the Immigration and Nationality Act), and the Fifth, Eighth, and Tenth Circuits have done the same when interpreting this provision and the materially indistinguishable text of § 2252, *see Hubbard,* 480 F.3d at 347 ("We must assume that Congress chose the words 'relating to' [in § 2252A(b)(1)] for a purpose."); *United States [redacted] Weis,* 487 F.3d 1148, 1152 (8th Cir.2007) (construing "relating to" broadly in § 2252); *United States [redacted] McCutchen,* 419 F.3d 1122, 1127 (10th Cir.2005) (same). In short, § 2252A does not simply mandate a sentencing enhancement for individuals convicted of state offenses *equivalent* to sexual abuse. Rather, it mandates the enhancement for any state offense that stands in some relation, bears upon, or is associated with that generic offense.

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Finally, experience indicates that when Congress intends to require a state offense to be congruent to a corresponding federal offense for sentencing enhancement purposes, it will draft such a requirement expressly. For example, ***744**18 U.S.C. § 2241(c) requires a life sentence where the defendant "has previously been convicted of another Federal offense under this subsection, *or of a State offense that would have been an offense under either such provision had the offense occurred in a federal prison.*" 18 U.S.C. § 2241(c) (emphasis added).FN4 Similarly, 18 U.S.C. § **3559(e)(2)(B)** defines a "State sex offense" for purposes of that subsection to mean "an offense under State law that is punishable by more than one year in prison and *consists of conduct that would be a federal sex offense.*" 18 U.S.C. § **3559(e)(2)(B)** (emphasis added).

> FN4. The phrase "either such provision" refers to 18 U.S.C. §§ 2241(c) and 2243(a). *United States* [redacted] *Etimani,* 328 F.3d 493, 503 (9th Cir.2003).

Sinerius cites both § 2241(c) and § **3559(e)(2)(B)** as evidence that his Montana conviction is not a predicate offense "relating to ... sexual abuse" under § 2252A(b), relying on our decision in *United States* [redacted] *Etimani,* 328 F.3d 493 (9th Cir.2003), as support. Given the material differences in the statutory language, however, Sinerius's reliance on *Etimani* is misplaced. In *Etimani,* we refused to qualify categorically a conviction under a state statute prohibiting "sexual contact" as a predicate offense under § 2241(c). The state statute defined "sexual contact" to include touching through clothing, while § 2241(c) required "skin-to-skin contact." *Etimani,* 328 F.3d at 503.

But as discussed previously, § 2241(c) expressly requires that a state predicate offense include all the elements of a corresponding federal crime; § 2252A(b) imposes no such limitation. For that reason, *Etimani* not only fails to support Sinerius's interpretation, it provides reliable evidence that Congress's failure to include an equivalency requirement in § 2252A(b) manifested its intent that no such requirement exist. *See Hubbard,* 480 F.3d at 348 (concluding that the terms "aggravated sexual abuse," "sexual abuse," and "abusive conduct involving a minor" in § 2252A(b)(1) are "generic terms, describing generic offenses" without reference to federal offenses defined elsewhere in the Code).

Accordingly, we interpret § 2252A(b) in light of its plain text and reject Sinerius's argument that a state conviction "relating to ... sexual abuse" must meet the federal definition of sexual abuse under § 2242 in order to qualify as a predicate offense for purposes of § 2252A. We therefore conclude that Sinerius's conviction under the Montana sexual assault statute categorically qualifies as a predicate offense triggering the sentencing enhancement under § 2252A(b).

C

Since we conclude that Sinerius's prior Montana conviction categorically qualifies as "sexual abuse" for purposes of § 2252A(b), we need not consider whether the conviction would also qualify as "aggravated sexual abuse" or "abusive sexual conduct involving a minor" under the same provision, nor is it necessary that we examine Sinerius's conviction under the "modified" categorical approach.

III

For the foregoing reasons, we agree with the district court's determination that Sinerius's prior conviction under the Montana sexual assault statute qualifies as a predicate offense under §§ 2252A(b)(1) & (2). Therefore, we conclude that the district court did not err in imposing an enhanced mandatory minimum sentence of 15 years for Sinerius's conviction under ***745** § 2252A(a)(2) and an enhanced mandatory minimum sentence of 10 years for Sinerius's conviction under § 2252A(a)(5)(B). The decision of the district court is

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AFFIRMED.

C.A.9 (Mont.),2007.
U.S. [redacted]. Sinerius
504 F.3d 737, 07 Cal. Daily Op. Serv. 11,330, 2007
Daily Journal D.A.R. 14,672

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H
U.S. [redacted]. Johnson
C.A.7 (Ind.),2007.

United States Court of Appeals,Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Charles M. JOHNSON, Jr., Defendant-Appellant.
No. 06-3968.

Argued April 10, 2007.
Decided July 30, 2007.

Background: Defendant was convicted, upon a conditional guilty plea, following denial of his motion to suppress, in the United States District Court for the Southern District of Indiana, John Daniel Tinder, J., of production of child pornography. Defendant appealed.

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

(1) defendant voluntarily consented to search of his computer and living area;

(2) law enforcement agents had probable cause to search defendant's computer and living quarters; and

(3) imposition of did not violate defendant's Fifth or Sixth Amendment rights.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
The Court of Appeals reviews a district court's ruling on a motion to suppress de novo.

[2] Criminal Law 110 ⇐1158(2)

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(2) k. Conclusiveness of Findings on Preliminary Proceedings in Conduct of Trial in General. Most Cited Cases
Because the voluntariness of a defendant's consent to search is a factual determination, the Court of Appeals reviews a district court's resolution of this question for clear error.

[3] Searches and Seizures 349 ⇐171

349 Searches and Seizures
349V Waiver and Consent
349k171 k. In General. Most Cited Cases
The Fourth Amendment's prohibition against warrantless searches does not apply when the defendant consents voluntarily to the search. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 ⇐194

349 Searches and Seizures
349VI Judicial Review or Determination
349k192 Presumptions and Burden of Proof
349k194 k. Consent, and Validity Thereof. Most Cited Cases
The government bears the burden of proving that consent to search was given freely and voluntarily. U.S.C.A. Const.Amend. 4.

[5] Searches and Seizures 349 ⇐201

349 Searches and Seizures
349VI Judicial Review or Determination
349k201 k. Questions of Law or Fact. Most Cited Cases
Whether a defendant voluntarily consented to a search is a factual assessment which turns on the

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totality of the circumstances. U.S.C.A. Const.Amend. 4.

[6] Searches and Seizures 349 ⇐180

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k180 k. Voluntary Nature in General. Most Cited Cases

Searches and Seizures 349 ⇐183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k183 k. Knowledge of Rights; Warnings and Advice. Most Cited Cases

Searches and Seizures 349 ⇐184

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k184 k. Custody, Restraint, or Detention Issues. Most Cited Cases
Among the factors a court considers in determining whether consent to search was voluntarily given are: (1) the person's age, intelligence, and education, (2) whether he was advised of his constitutional rights, (3) how long he was detained before he gave his consent, (4) whether his consent was immediate, or was prompted by repeated requests by the authorities, (5) whether any physical coercion was used, and (6) whether the individual was in police custody when he gave his consent. U.S.C.A. Const.Amend. 4.

[7] Searches and Seizures 349 ⇐181

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k181 k. Particular Concrete Applications. Most Cited Cases

Searches and Seizures 349 ⇐183

349 Searches and Seizures
349V Waiver and Consent
349k179 Validity of Consent
349k183 k. Knowledge of Rights; Warnings and Advice. Most Cited Cases
Defendant voluntarily consented to a search of his computer and living area; although law enforcement agents requested more than once that defendant consent to search, and agents told him that they would need to secure the residence until a search warrant issued if he did not consent, defendant stated that he did not feel threatened or coerced and that he understood the consent form he signed, defendant was 48 years old, he was of at least average intelligence, and the interview with agents was calm and professional at all times. U.S.C.A. Const.Amend. 4.

[8] Criminal Law 110 ⇐394.1(3)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(3) k. Effect of Illegal Conduct on Other Evidence. Most Cited Cases
The doctrine of inevitable discovery provides that, when the government can establish by a preponderance of the evidence that the information obtained would have been discovered ultimately or inevitably by lawful means, the deterrence rationale of the exclusionary rule no longer applies and the evidence should be admitted. U.S.C.A. Const.Amend. 4.

[9] Obscenity 281 ⇐7.6

281 Obscenity
281k7.5 Pretrial Seizure, Suppression, or Censorship
281k7.6 k. In General; Necessity for Adversary Hearing. Most Cited Cases
Law enforcement agents had probable cause to search defendant's computer and living quarters, where they had acquired detailed information from

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minor victim that defendant had taken pornographic photographs of her, that defendant used a silver digital camera, and that he possessed a black computer, and during the course of his conversation with agents, defendant confirmed that he owned a silver digital camera and black computer, and that he previously lived in the same city as victim. U.S.C.A. Const.Amend. 4.

[10] Jury 230 ⇐34(7)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(7) k. Particular Cases in General. Most Cited Cases
Imposition of mandatory minimum life sentence for defendant convicted of production of child pornography, based on determination of the fact of a prior conviction by sentencing judge, rather than jury, did not violate defendant's Fifth or Sixth Amendment rights. U.S.C.A. Const.Amends. 5, 6; 18 U.S.C.A. §§ 2251(e), **3559(e)**.

[11] Indictment and Information 210 ⇐113

210 Indictment and Information
210V Requisites and Sufficiency of Accusation
210k113 k. Matter of Aggravation in General. Most Cited Cases

Jury 230 ⇐34(6)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(6) k. In General. Most Cited Cases

Sentencing and Punishment 350H ⇐322

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(F) Evidence
350Hk322 k. Degree of Proof. Most Cited Cases
For sentencing purposes, the fact of a prior conviction need not be found by a jury beyond a reasonable doubt, nor must it be alleged in the indictment. U.S.C.A. Const.Amends. 5, 6.

***537** Gayle Helart (argued), Office of the United States Attorney, Indianapolis, IN, for Plaintiff-Appellee.
William H. Dazey, Jr. (argued), Indiana Federal Community Defenders, Inc., Indianapolis, IN, for Defendant-Appellant.

Before BAUER, POSNER and RIPPLE, Circuit Judges.

***538** RIPPLE, Circuit Judge.

Charles Johnson was charged in a two-count indictment with production of child pornography in violation of 18 U.S.C. § 2251(a) [FN1] and (e).[FN2] Mr. Johnson filed a motion to suppress certain evidence on the ground that his consent to the search was involuntary. He also claimed that his waiver of his *Miranda* rights was involuntary. The district court conducted an evidentiary hearing and denied Mr. Johnson's motion to suppress. Mr. Johnson pleaded guilty but preserved his right to appeal the denial of his motion to suppress. The district court accepted his plea. After a sentencing hearing, Mr. Johnson was sentenced to concurrent terms of life imprisonment. He timely filed this appeal. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

FN1. 18 U.S.C. § 2251(a) provides:

(a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for

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the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.

FN2. 18 U.S.C. § 2251(e) provides:

(e) Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than 15 years nor more than 30 years, but if such person has one prior conviction under this chapter, section 1591, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 25 years nor more than 50 years, but if such person has 2 or more prior convictions under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to the sexual exploitation of children, such person shall be fined under this title and imprisoned not less than 35 years nor more than life. Any organization that violates, or attempts or conspires to violate, this section shall be fined under this title. Whoever, in the course of an offense under this section, engages in conduct that results in the death of a person, shall be punished by death or imprisoned for not less than 30 years or for life.

I

BACKGROUND

A.

The National Center for Missing and Exploited Children ("NCMEC") conducted an investigation into sexually explicit images of a prepubescent female known as Jane Doe. Images of this young girl had been found on several individuals' computers and were labeled with Jane Doe's actual name. NCMEC analysts used this information to locate the girl in Indianapolis, Indiana.

Law enforcement officials interviewed Jane Doe. She stated that a man she called "Charlie" had been a live-in babysitter for her neighbor's family. She stated that "Charlie" had taken nude photos of her since she was six or seven years old and ***539** that he had molested her and two of the children living with him at the time. She also stated that the photos had been taken with a silver digital camera and that she had seen him transfer the photos to a black Dell-brand computer.

"Charlie" was identified as Mr. Johnson, and a warrant for his arrest issued on December 15, 2005. Law enforcement officials executed this arrest warrant the following day at a home in Cincinnati, Ohio. Mr. Johnson resided there as a live-in babysitter for the same family with whom he had lived in Indianapolis.

The law enforcement officials who went to arrest Mr. Johnson included Agent Tim Rothrock and Sergeant Chris Hunt. The officers knocked on the door of the home, and the owner allowed them inside. The officers proceeded to the basement where the owner told them Mr. Johnson could be found. Sgt. Hunt had left his firearm in the car, and, although Agent Rothrock had his firearm in his hand, he carried it behind his back. The agents identified themselves to Mr. Johnson, who was in the basement with a toddler. The toddler was removed from the room. Agent Rothrock then put away his firearm and did not take it out again during the inter-

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view with Mr. Johnson.[FN3] The law enforcement officers told Mr. Johnson his name had come up during an investigation and read him his *Miranda* rights. Mr. Johnson and the officers each signed a form indicating Mr. Johnson's waiver of his *Miranda* rights.

FN3. Mr. Johnson later testified that he never saw the firearm.

The two officers then proceeded to a small bedroom where they interviewed Mr. Johnson. The tone was conversational and, although there were other officers in the home, only Sgt. Hunt and Agent Rothrock remained in the room with Mr. Johnson. Mr. Johnson stated that he had lived with the children who had been depicted in the photographs and that he had a computer in his bedroom area. Agent Rothrock asked if Mr. Johnson would consent to a search of his bedroom area and his computer, and Mr. Johnson calmly replied that he would not. Agent Rothrock then asked Mr. Johnson if he would continue talking; Mr. Johnson replied that he would. Mr. Johnson then confirmed that he owned a black Dell computer and that he likewise owned a silver digital camera. At this point in the conversation, Agent Rothrock gave Mr. Johnson more information about the investigation including the fact that a victim had stated that he had taken photos of her and that he had used a specific digital camera and computer. Further, Agent Rothrock told Mr. Johnson that some of these photos had been found on the internet. He then told Mr. Johnson that he believed he had probable cause to obtain a search warrant which would allow him to search Mr. Johnson's computer and living area. He explained that the statement about the warrant was not meant as a threat and that a magistrate judge, and not he, would make the decision as to whether to issue a warrant. Agent Rothrock then told Mr. Johnson he would have to secure the residence until the magistrate judge could be contacted, which would involve limiting the residents' ability to enter and exit the house.

The officers then left and Agent Rothrock contacted an Assistant United States Attorney ("AUSA") in Indianapolis. He described the house and the property inside the house, including the computer and the camera, in which Mr. Johnson retained a privacy interest. He also discussed the factors that supported probable cause, at which point the AUSA agreed to start the process of obtaining a search warrant. Agent Rothrock then returned to the home, told Mr. Johnson that the process of ***540** obtaining a warrant had been started and that the AUSA believed that probable cause existed. Agent Rothrock again asked Mr. Johnson if he would consent to a search. Sgt. Hunt recalled Agent Rothrock stating that Mr. Johnson's consent "could possibly save time for us." R.53 at 105-06.

Mr. Johnson was read forms acknowledging his consent to the search of his computer and his living area, and he was reread his *Miranda* warnings. Mr. Johnson signed both forms. Mr. Johnson stated that the police might find child pornography on the computer. The officers continued to question Mr. Johnson about the child pornography on his computer. Mr. Johnson then acknowledged that he had taken the photos. He declined to answer any questions as to the identity of the children in the photos and was then asked if he wished to speak to an attorney regarding that particular question; he replied that he would.

Mr. Johnson identified Jane Doe in one photograph in which she was fully clothed and stated that the photo had been taken in his Indianapolis bedroom. He declined to answer questions about whether he had any knowledge as to how the photo had become available on the internet and stated that he wished to speak to an attorney as to that question as well. When Agent Rothrock sought confirmation that Mr. Johnson wished to speak to an attorney regarding that question only, Mr. Johnson declined to answer any further questions. At that point, Mr. Johnson's computer was removed, and he was arrested.

On July 6, 2006, the district court held a suppression hearing. Mr. Johnson testified that he had

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not seen Agent Rothrock's weapon when he came down the stairs. He stated that the officers were not harsh or mean to him. He also said that he understood that he was suspected of a crime and that he had signed the *Miranda* waiver. He agreed that he never felt threatened or coerced into answering questions. He further stated that he was concerned for the other residents of the home because Agent Rothrock had mentioned his intent to secure the home until the search warrant was issued. He claimed that his consent to the search was involuntary because he perceived that hardship would befall other members of the household if he persisted in declining consent. When he invoked his right to counsel as to certain questions, he indicated that he did not believe he had to answer questions on those topics. He stated that he had read and understood the consent to search forms and the *Miranda* waiver at the time he signed it.

Mr. Johnson's computer was found to contain approximately 3,700 images of child pornography and child erotica. The nine images of Jane Doe found by the NCMEC were on the computer, and the computer allowed file sharing.

B.

The district court found that Mr. Johnson's consent to search his living area and computer was voluntary. The court did not believe that Agent Rothrock's statements that he would secure the home while a search warrant was obtained had overborne Mr. Johnson's free will. The district court found this consent to be voluntary because Mr. Johnson (1) was approximately 48 years old, had two years of college and had his associate's degree, (2) had demonstrated computer savvy, (3) had gained and used managerial experience in his employment, (4) had declined consent earlier in the encounter and stated that he did not feel threatened, (5) had consented after he was told that the process of obtaining a warrant had commenced, (6) had been read his *Miranda* warnings a second time, (7) had consented after one hour and five minutes which was not an overly long ***541** period of detention, (8) was not barraged with requests for consent, and (9) was not subject to a threatening atmosphere. The district court also found that Mr. Johnson selectively had waived his *Miranda* rights, only requesting counsel as to two specific questions which was an ambiguous assertion of his right to counsel as to all questions. Finally, the district court found that, even if his consent were not voluntary, the evidence would not be suppressed because it would be admissible under the inevitable discovery doctrine.

At sentencing, the district court computed, without objection, the sentencing guidelines range. The applicable guidelines range of 188-235 months was trumped by 18 U.S.C. § **3559(e)**,[FN4] which requires mandatory life imprisonment for repeated sex offenses against children. Mr. Johnson qualified as a repeat sex offender against minors on the basis of convictions in 1989 for second degree rape, second degree sodomy and sexual abuse offenses for victimizing two children under the age of twelve. Mr. Johnson preserved Fifth, Sixth and Eighth Amendment objections to the invocation of the recidivist statutes. The district court sentenced Mr. Johnson to concurrent terms of life imprisonment.

FN4. 18 U.S.C. § **3559(e)** provides:

(e) Mandatory life imprisonment for repeated sex offenses against children.-

(1) In general.-A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

II

DISCUSSION

A.

[1][2] Mr. Johnson submits on appeal that his

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consent to the search of his bedroom area and computer was involuntary and, therefore, that his motion to suppress evidence should have been granted.FN5 We review a district court's ruling on a motion to suppress de novo. However, we review the district court's factual findings for clear error. *United States* ▮ *Lawshea,* 461 F.3d 857, 859 (7th Cir.2006). Because the voluntariness of a defendant's consent to search is a factual determination, we review a district court's resolution of this question for clear error. *United States* ▮ *Raibley,* 243 F.3d 1069, 1076 (7th Cir.2001).

> FN5. Mr. Johnson does not appeal the district court's denial of his motion to suppress statements to law enforcement officials. He recognizes that he selectively waived his *Miranda* rights, *see United States* ▮ *Amaro,* 816 F.2d 284, 286 (7th Cir.1987), and that suppression of his statements would have left the Government's case largely unchanged. *See* Appellant's Br. at 11.

[3][4][5][6] The Fourth Amendment's prohibition against warrantless searches does not apply when the defendant consents voluntarily to the search. *United States* ▮ *Sandoval-Vasquez,* 435 F.3d 739, 744 (7th Cir.2006). The Government bears the burden of proving that consent freely and voluntarily was given. *Id.* Whether a defendant voluntarily consented to a search is a factual assessment which turns on the totality of the circumstances. *Schneckloth* ▮ *Bustamonte,* 412 U.S. 218, 227, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). We must keep in mind that "a determination of voluntariness does not ride on the presence or absence of a single controlling factor." *United States* ▮ *LaGrone,* 43 F.3d 332, 334 (7th Cir.1994) (internal citations and quotation marks omitted). Rather, we must undertake a "careful scrutiny of all the surrounding circumstances." *Id.* (citing ***542** *Schneckloth,* 412 U.S. at 226, 93 S.Ct. 2041). Among the factors we consider are: "(1) the person's age, intelligence, and education, (2) whether he was advised of his constitutional rights, (3) how long he was detained before he gave his consent, (4) whether his consent was immediate, or was prompted by repeated requests by the authorities, (5) whether any physical coercion was used, and (6) whether the individual was in police custody when he gave his consent." *Sandoval-Vasquez,* 435 F.3d at 744.

[7] Mr. Johnson contends that his consent was given involuntarily because of two occurrences in the course of the police requests for consent: (1) Agent Rothrock requested more than once that Mr. Johnson consent to a search; (2) Agent Rothrock said that he would need to secure the residence until the warrant issued, thereby causing his free will to be overborne. Mr. Johnson was concerned that the other residents of the home would be unable freely to come and go. We shall examine each of these contentions.

With respect to Mr. Johnson's first submission, our opinion in *United States* ▮ *LaGrone,* 43 F.3d 332, 333 (7th Cir.1994), is helpful. In *LaGrone,* as in this case, the defendant was asked more than once whether he would consent to a search. We stated that "[w]hile it is true that the officers asked LaGrone more than once whether he would consent to the search, we do not believe this constitutes the sort of repetitive psychological harassment that should tip the balance in favor of LaGrone." *Id.* at 334. Here, Agent Rothrock asked Mr. Johnson to consent on more than one occasion. However, Mr. Johnson himself stated that at no time did he feel threatened or coerced.

With respect to the second submission, in *United States* ▮ *Santiago,* 428 F.3d 699, 705 (7th Cir.2005), we determined that a defendant had consented freely and voluntarily to a search despite his claim that officers had threatened to arrest his fiancée and to have their children taken into protective custody. The district court, however, concluded that no actual threat had been issued. Rather, the district court determined that, when his home address had been discovered and he realized that a search of his home was therefore likely, Santiago

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became "rightful[ly] concern[ed]" for his family. *Id.* The district court further found that this "rightful concern" did not amount to "psychological pressure." *Id.* In reaching this conclusion, the district court found it important that the authorities had behaved professionally, that the entire incident took only twenty minutes and that the encounter was "devoid of any badgering or harassment." *Id.* Looking to the totality of the circumstances considered by the district court, we concluded, in *Santiago,* that the district court's voluntariness finding was not clearly erroneous. *Id.* Similarly, we must conclude that Mr. Johnson's concern that he might inconvenience the other residents of the home was a "rightful concern," but not one that caused "psychological pressure."

Mr. Johnson is 48 years of age and of at least average intelligence. He testified at the suppression hearing that he understood the consent form, that he never felt coerced or threatened and that he understood he was waiving his Fourth Amendment rights. The interview was calm and professional at all times. Considering the totality of the factors surrounding Mr. Johnson's consent, we certainly cannot say the district court clearly erred in finding that consent was voluntarily and freely given.

B.

[8] Even if Mr. Johnson did not consent, the evidence would have been otherwise***543** admissible under the inevitable discovery doctrine. *See Nix* ▮ *Williams,* 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). This doctrine provides that, when the Government can establish by a preponderance of the evidence that the information obtained would have been discovered ultimately or inevitably by lawful means, the deterrence rationale of the exclusionary rule no longer applies and the evidence should be admitted. *Id.*"The prosecution must establish that it had probable cause and prove the existence of a chain of events that would have led to a warrant [ ] independent of the search." *United States* ▮ *Brown,* 328 F.3d 352, 357 (7th Cir.2003) (internal citations and quotation marks omitted).

[9] The facts of this case clearly demonstrate that probable cause existed for the search. *See Illinois* ▮ *Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (establishing a totality of the circumstances test by which to determine whether probable cause exists). The officers had acquired detailed information from Jane Doe that Mr. Johnson had taken the photos, that she was the child depicted in the photos and that Mr. Johnson had used a silver digital camera. She also mentioned that he possessed a black Dell computer. R.53 at 15-16. Indeed, based on this information, Agent Rothrock obtained a warrant for Mr. Johnson's arrest before his encounter with Mr. Johnson. Moreover, before Mr. Johnson consented to the search, he had a conversation with the officers. During the course of that conversation, he stated that he owned a black Dell computer and a silver digital camera. He confirmed that he previously had lived in Indianapolis. This information would more than suffice to establish probable cause upon which to issue a search warrant. Therefore, the deterrence rationale of the exclusionary rule would not apply, and the evidence would be admissible under the inevitable discovery doctrine.

C.

[10] Mr. Johnson also submits that the district court violated his Fifth and Sixth Amendment rights by imposing the mandatory minimum life sentence, required by 18 U.S.C. § **3559(e)** and 18 U.S.C. § 2251(e), because the underlying fact of a prior conviction had not been charged in the indictment or proven beyond a reasonable doubt to a jury.

[11] Mr. Johnson acknowledges that this court is without power to decide this issue in his favor. The governing law of the Supreme Court unequivocally states that the fact of a prior conviction *need not* be found by a jury beyond a reasonable

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doubt, nor must it be alleged in the indictment. *Almendarez-Torres* [redacted] *United States,* 523 U.S. 224, 246-47, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Apprendi* [redacted] *New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explicitly preserved *Almendarez-Torres, see*530 U.S. at 490, 120 S.Ct. 2348 ("*Other than the fact of a prior conviction,* any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt") (emphasis added), although left open the possibility that future cases might revisit its holding, *see id.* at 489-90, 120 S.Ct. 2348. Later cases, including *Blakely* [redacted] *Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), *United States* [redacted] *Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and *Shepard* [redacted] *United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), each have confirmed *Almendarez-Torres'* continuing vitality. *See United States* [redacted] *Sachsenmaier,* 491 F.3d 680, 683 (7th Cir.2007) (confirming that *Almendarez-Torres* remains the governing law but noting that ***544** the defendant had preserved the argument for consideration by the Supreme Court). Therefore, we cannot accept Mr. Johnson's claim that the district court's failure to submit this issue to the jury constitutes reversible error.

Conclusion

For these reasons, the judgment of the district court is affirmed.

AFFIRMED

C.A.7 (Ind.),2007.
U.S. [redacted]. Johnson
495 F.3d 536

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H
U.S. [redacted]. Leach
C.A.8 (Mo.),2007.

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellant,
[redacted].
Tyler M. LEACH, Appellee.
No. 06-1471.

Submitted: Feb. 14, 2007.
Filed: June 22, 2007.

Background: Defendant was convicted in the United States District Court for the Western District of Missouri, Howard F. Sachs, Senior District Judge, of knowingly using a facility of interstate commerce to attempt to persuade, induce, and entice a minor to engage in illegal sexual activity, and the government appealed his 72-month sentence.

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

(1) government did not breach plea agreement by advocating at sentencing for application of sentencing guidelines offense level enhancement, and

(2) offense level enhancement was warranted for having committed the offense subsequent to sustaining a sex offense conviction.

Vacated and remanded.

West Headnotes

[1] Sentencing and Punishment 350H ⇐290

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk290 k. Successive, Supplemental and Updated Report. Most Cited Cases

Sentencing and Punishment 350H ⇐299

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk299 k. Objections and Disposition Thereof. Most Cited Cases
Government's failure to timely object to original presentence investigation report (PSR) prepared for defendant's sentencing for knowingly using facility of interstate commerce to attempt to persuade, induce, and entice a minor to engage in illegal sexual activity did not preclude government from advocating at sentencing for sentencing guidelines offense level enhancement that was not mentioned in original PSR; probation office amended PSR more than a month before the sentencing hearing to include the enhancement, giving defendant ample opportunity before sentencing to prepare sentencing memoranda on applicability of enhancement and to formulate an argument regarding the enhancement. Fed.Rules Cr.Proc.Rule 32(f), 18 U.S.C.A.

[2] Criminal Law 110 ⇐273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases
Government did not breach plea agreement pursuant to which defendant pleaded guilty to knowingly using facility of interstate commerce to attempt to persuade, induce, and entice a minor to engage in illegal sexual activity by advocating at sentencing for application of sentencing guidelines offense level enhancement under chapter 4 of guidelines for having committed offense subsequent to sustaining a sex offense conviction; although government stipulated in plea agreement that defendant's base offense level was 24, agreement only referred to base offense level under chapter 2 of guidelines, and did not address adjustments from chapter 4, and agreement stated that, as to unmentioned guidelines issues, parties were free to advocate their positions at sentencing. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

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[3] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Issues regarding the interpretation and enforcement of a plea agreement are reviewed de novo.

[4] Criminal Law 110 ⇐273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases
Plea agreements are contractual in nature, and should be interpreted according to general contract principles.

[5] Sentencing and Punishment 350H ⇐795

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(E) Prior or Subsequent Misconduct
350Hk795 k. Order. Most Cited Cases
In a case in which the defendant had pleaded guilty in Kansas state court to attempted aggravated criminal sodomy with a child under age 14, but had not yet been sentenced for that offense when he committed the federal offense of knowingly using a facility of interstate commerce to attempt to persuade, induce, and entice a minor to engage in illegal sexual activity, a sentencing guidelines offense level enhancement was warranted for having committed the offense subsequent to sustaining a sex offense conviction. U.S.S.G. § 4B1.5(a), 18 U.S.C.A.

***859** Philip M. Koppe, Asst. U.S. Atty., argued, Kansas City, MO (Bradley J. Schlozman, U.S. Atty., Cynthia L. Phillips, Asst. U.S. Atty., on the brief), for appellant.
Stephen C. Moss, Asst. Fed. Public Defender, argued, Kansas City, MO (Raymond C. Conrad, Jr., Fed. Public Defender, on the brief), for appellee.

Before WOLLMAN, BYE, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Tyler Leach pleaded guilty, pursuant to a plea agreement, to knowingly using a facility of interstate commerce to attempt to persuade, induce, and entice a minor to engage in illegal sexual activity, in violation of 18 U.S.C. § 2422(b). In sentencing Leach, the district court declined to apply enhancements advocated by the government under U.S.S.G. § 4B1.5(a) or, alternatively, under § 4B1.5(b). Leach was sentenced to 72 months' imprisonment. The government appeals the district court's decision that neither enhancement applies. We reverse.

***860** I. *Background*

On February 22, 2005, Leach pleaded guilty in Kansas state court to attempted aggravated criminal sodomy with a child under the age of 14 years ("the Kansas offense"). The Kansas offense involved Leach receiving oral sex from a 13-year old girl that he had met in an internet chat-room. Leach's sentencing on that offense was set for March 15, 2005.

On March 8, 2005, one week before his scheduled sentencing on the Kansas offense, Leach conversed in a chat-room with someone that he thought was a 14-year old girl named "Amber." However, "Amber" was actually an undercover FBI agent. Leach's conversations with "Amber" quickly became sexual. The next day, Leach again contacted "Amber" and made arrangements to travel from his residence in [redacted], Kansas, to her residence in Kansas City, Missouri, to engage in sexual activity. On March 10, 2005, Leach arrived at the Kansas City, Missouri address provided by "Amber," and was arrested by federal agents. During a post-arrest interview, Leach admitted that he had arranged to have vaginal and oral sex with "Amber," whom he believed to be a 14-year old girl. Because of Leach's arrest, his sentencing on the Kansas offense did not occur as scheduled.

The government charged Leach in a three-count federal indictment with knowingly using a facility of interstate commerce to attempt to entice a minor into engaging in illegal sexual conduct, in violation of 18

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U.S.C. § 2422(b) (Count One); traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with another person, in violation of 18 U.S.C. § 2423(b) (Count Two); and criminal forfeiture, pursuant to 18 U.S.C. § 2253 (Count Three). Leach entered into a plea agreement, pleading guilty to Count One in return for the government dropping the remaining counts. In the plea agreement, Leach acknowledged that he was subject to a 5-year minimum and a 60-year maximum sentence under 18 U.S.C. § 2426(a) because his federal "offense occurred after [Leach] had a prior sex offense conviction."

The parties stipulated in the plea agreement that: (1)"the applicable Guidelines section for the offense was U.S.S.G. § 2G1.3 (Travel to engage in prohibited sexual conduct with a minor);" (2) "the base level offense is 24 pursuant to U.S.S.G. § 2G1.3(a);" (3) Leach was subject to a two-level enhancement pursuant to U.S.S.G. § 2G2.2(b)(3)(A) because the offense involved the use of a computer; (4) Leach was entitled to a three-level reduction for acceptance of responsibility; (5) "there [was] no agreement between the parties regarding the defendant's criminal history category;" (6) neither party would seek a departure from the applicable guidelines range; and (7) the court would determine the "applicable criminal history category after receipt of the presentence investigation report."

Additionally, the plea agreement limited its scope to issues explicitly addressed therein and had no effect on any unmentioned Sentencing Guidelines issues. As to any unmentioned issues, "the parties were free to advocate their respective positions at the sentencing hearing." It is undisputed that the plea agreement was negotiated without any consideration of U.S.S.G. § 4B1.5. In fact, the government acknowledges that it was "completely unaware" of the potential applicability of the enhancement when it negotiated and executed the plea agreement.

The presentence investigation report ("PSR") was prepared on October 3, 2005, and revised, along with an addendum, on November 3, 2005. The PSR concluded that Leach's Guidelines range was 60-63 ***861** months FN1 based on an offense level of 23 and criminal history category of II. Neither party objected to these calculations. Thereafter, on November 10, 2005, the probation office filed a second addendum to the PSR, stating that "the guidelines were inaccurately calculated" in the original PSR and suggesting that Leach was subject to an enhancement under Guidelines § 4B1.5(a) based on the existence of the Kansas offense for which he had already been adjudicated guilty but had not yet been sentenced. If the § 4B1.5(a) enhancement applied, Leach's offense level would have been 34 with a criminal history Category [redacted], making Leach's Guidelines range 168-210 months' imprisonment. Leach timely objected to the § 4B1.5(a) enhancement.

> FN1. The Guidelines range would have been 51-63 months, if not for the statutory minimum sentence of 60 months.

Both parties filed briefs, prior to sentencing, on the applicability of the § 4B 1.5(a) enhancement. Leach contended that the enhancement did not apply because he had not yet been sentenced for the Kansas offense, and therefore had not yet sustained a prior sex offense *conviction.* Additionally, Leach urged the court to honor the parties' stipulations in the plea agreement and sentence him accordingly. The government, despite having not objected to the initial or first-amended PSR, which did not include the § 4B 1.5 enhancement-and admitting that it had previously been "completely unaware" of § 4B1.5-adopted the position of the probation office and advocated for the application of § 4B 1.5(a).

On December 20, 2005, the court held a hearing on the applicability of § 4B 1.5(a) and concluded that the enhancement did not apply because Leach had not yet been sentenced for the Kansas offense. The court determined that it was unclear whether the "conviction" requirement of § 4B 1.5(a) required the defendant to have been sentenced for the prior offense or merely have been adjudicated guilty by plea of guilty, nolo contendre, or a finding of guilt. Based on the failure of the enhancement section to define the term "conviction," recent legislative enactments regarding the term, and the rule of lenity, the court refused to apply the § 4B1.5(a) enhancement to Leach. [FN2]

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FN2. After the court ruled that § 4B1.5(a) did not apply, Leach stated for the record that in the event the court's decision on the enhancement was overturned, his position was that the plea agreement prevented the government from advocating for the enhancement. At no time during the December 20, 2005, hearing did Leach assert that the government's failure to object to the original PSR precluded it from advocating for enhancement.

The government moved for reconsideration of the court's ruling on the § 4B1.5(a) enhancement, and the probation office filed a third addendum to the PSR, suggesting that if § 4B1.5(a) did not apply, then a five-level enhancement under § 4B1.5(b) should apply because the defendant had engaged "in a pattern of activity involving prohibited sexual conduct." If § 4B1.5(b) applied, Leach's total offense level would increase from 23 to 28, causing his Guidelines range to increase from 60-63 months to 87-108 months' imprisonment. Both parties filed sentencing briefs regarding the applicability of § 4B1.5(b).

On January 13, 2006, the court conducted Leach's sentencing hearing and heard arguments on both the reconsideration of § 4B1.5(a) and the applicability of § 4B1.5(b). After oral argument, the court denied the government's motion to reconsider its ruling on the § 4B1.5(a) enhancement, concluding that the government had no standing to seek the enhancement***862** because it had failed to timely object to the original PSR.[FN3] Moreover, the court determined that the plea agreement prevented the government from advocating for the enhancement. Alternatively, the court denied the motion to reconsider for the same reasons given in its original decision-that it was unclear whether § 4B1.5(a)'s conviction requirement required a defendant to have been sentenced on the conviction or merely adjudicated guilty and that the rule of lenity favored Leach. Further, the court determined that § 4B1.5(b) was inapplicable because the government failed to prove two prior occasions that were distinct from the offense of conviction.

FN3. Prior to the January 13, 2006 sentencing hearing, Leach had not argued that the government had no standing to advocate for the enhancements because it had failed to timely object to the original PSR which did not include either enhancement.

The district court ultimately concluded that Leach's offense level was 23, his criminal history was a Category II and his advisory guideline range was 60-63 months. The court then sentenced Leach to 72 months' imprisonment, a 9-month increase from the top of the calculated Guidelines range. The government appeals.

II. *Discussion*

The government contends that the district court erred in not applying § 4B1.5(a), or alternatively, § 4B1.5(b). Leach agrees with the district court's conclusion that neither enhancement should apply but alternatively asserts that the plea agreement and the government's failure to timely object to the original PSR prevent it from advocating for either enhancement.

A. *Untimely Objections to the PSR*

Federal Rule of Criminal Procedure 32(f) states that "[w]ithin 14 days after receiving the presentence report, the parties must state in writing any objections ... contained in or omitted from the report." "The reason for the fourteen-day filing requirement is 'so that the objections can be addressed and investigated prior to the sentencing hearing.' "*United States* [redacted] *May,* 413 F.3d 841, 849 (8th Cir.2005) (quoting *United States* [redacted] *Jones,* 70 F.3d 1009, 1010 (8th Cir.1995)) (emphasis deleted).

[1] Here, the probation officer did not include the § 4B1.5(a) enhancement in the initial or first-amended PSR, and the government did not object to the omission. However, when the probation office amended the PSR, through the second addendum, to include the § 4B1.5(a) enhancement, Leach was put on notice-more than a month before his initial sentencing hearing-that the enhancement could be at issue. This gave Leach ample opportunity before sentencing to prepare a sentencing memoranda on the applicability of § 4B1.5(a) and formulate an argument regarding the enhancement. Given

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these circumstances, any possible prejudice to Leach from the government's failure to object to the original and first-amended PSR was cured by the adequate opportunity he was given to oppose the enhancement. *See United States v. Soto-Beniquez,* 356 F.3d 1, 52 (1st Cir.2004) ("Any possible prejudice to [defendant] from the government's non-compliance [with Federal Rule of Criminal Procedure 32] was cured by the district court's two-week continuance to give defense counsel an adequate opportunity to respond to the government's late submission."); *United States v. Young,* 140 F.3d 453, 457 (2d Cir.1998) ("The sentencing court may impose sentencing enhancements belatedly ***863** suggested by the Government and not contained in the PSR, provided the defendant is afforded an adequate opportunity to respond to the Government's late submission and any revision of the PSR.") (internal citation omitted). We hold that the government's arguments for the enhancements were not foreclosed.

B. *The Plea Agreement*

[2] Leach argues that the government's advocacy for the § 4B1.5(a) enhancement breached the plea agreement. The government stipulated that Leach's base offense level was 24, but the enhancement, if applied, would have increased Leach's offense level to 34. Leach further contends that because the plea agreement stipulated to a two-level enhancement for use of a computer, pursuant to § 2G2.2(b)(3)(A), without any reference to § 4B1.5 or any other enhancement, the agreement necessarily implied that no other enhancements would be applied.

[3][4] Issues regarding the interpretation and enforcement of a plea agreement are reviewed de novo. *United States v. Martinez-Noriega,* 418 F.3d 809, 811 (8th Cir.2005); *United States v. DeWitt,* 366 F.3d 667, 669 (8th Cir.2004). "Plea agreements are contractual in nature, and should be interpreted according to general contract principles." *DeWitt,* 366 F.3d at 669.

Leach asserts that our decision in *DeWitt,* compels us to find a breach of the plea agreement in this case. We disagree. In *DeWitt,* the government and the defendant stipulated to a base offense level and a specific drug quantity in a plea agreement. *Id.* at 668. After the plea agreement was accepted by the court at a change of plea hearing, the probation office prepared a PSR suggesting that DeWitt's relevant conduct made her accountable for additional drug amounts and recommended a higher base offense level. *Id.* at 668-69. At the sentencing hearing, the government, on its own initiative, sought to introduce evidence to establish the higher drug quantity set forth in the PSR, and DeWitt objected, claiming that the government had stipulated in the plea agreement to the base offense level and the drug quantity. *Id.* at 669. The district court allowed the evidence and subsequently found DeWitt accountable for the drug quantity recommended in the PSR and adopted the PSR's recommended base offense level. *Id.*

On appeal, we reversed, holding that the government breached the plea agreement when it introduced evidence at sentencing to attribute a greater drug quantity to the defendant when it had previously stipulated to the total drug quantity in the plea agreement. *Id.* at 670-72. Although the plea agreement entitled the government to offer evidence of uncharged relevant conduct, we ruled that such a general provision could not be read to override the specific provision to recommend only a certain drug quantity for Guidelines calculation purposes. *Id.* at 670. We noted that when stipulations in the plea agreement differ from recommendations in a PSR, there is no breach of the plea agreement if the court requests the parties to provide evidence or argument on the issue. *Id.* at 671. But, we ultimately concluded that "[w]here the government stipulates to a drug quantity and a base offense level, it may not then initiate an effort at the sentencing hearing to obtain a greater sentence, even if the government has come to believe that the stipulation was made in error." *Id.* at 671-72.

Although there are certainly some similarities between this case and *DeWitt,* we believe that the instant case is controlled by our decision in *Martinez-Noriega*. In *Martinez-Noriega,* the plea agreement ***864** stipulated that the defendant's base offense level was 20, pursuant to § 2D1.1. 418 F.3d at 810. The plea agreement in *Martinez-Noriega,* like the plea agreement

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here, made no agreement regarding the defendant's criminal history category under Chapter Four of the Guidelines and made no reference to any potential adjustment to his offense level under Chapter Four. *Id.* at 810-11. Prior to the sentencing hearing, the probation office prepared a PSR, which recommended that Martinez-Noriega be assessed an offense level of 32, pursuant to the career offender guideline, § 4B1.1(b)(C), because he had two prior felony drug convictions. *Id.* at 811. Martinez-Noriega objected, arguing that because his plea agreement stipulated that his base offense level was 20 and did not refer to § 4B1.1, the court was precluded from applying the career offender guideline. *Id.* The district court disagreed and sentenced Martinez-Noriega as a career offender. *Id.*

On appeal, Martinez-Noreiga argued that application of the career offender enhancement would render his base-offense-level stipulation under § 2D1.1 meaningless. He contended the existence of the specific stipulation concerning the base offense level necessarily implied that his offense level would be computed without regard to § 4B1.1. *Id.*"We reject[ed] Martinez-Noriega's argument because we [found] it inconsistent with the structure of the sentencing guidelines." *Id.* In reaching this conclusion, we explained:

The "Application Instructions" for use of the guidelines set forth nine sequential steps to be followed by the sentencing court in applying the provisions of the guidelines manual. The second step calls for the court to "[d]etermine the base offense level ... contained in the particular guideline in Chapter Two."USSG § 1B1.1(b). The next three steps direct the court to apply adjustments from Chapter Three of the guidelines. The sixth step then states that the court should "[d]etermine the defendant's criminal history category as specified in Part A of Chapter Four," and "*[d]etermine from Part B of Chapter Four any other applicable adjustments.*" USSG § 1B1.1(f). These adjustments from Part B include the enhanced offense levels for career offenders pursuant to USSG § 4B1.1.

Id. at 812. (emphasis in original).

We further explained that "[t]he guidelines contemplate ... that even when a defendant ultimately is subject to [a Chapter Four adjustment], the court will first compute the defendant's 'base offense level' under Chapter Two of the guidelines." *Id.* Thus, by stipulating to a base offense level, "[the] defendant has solidified where he will start in Chapter Two of the guidelines, but he has not protected himself against adjustments in Chapter Four."*Id.* at 813. Accordingly, we held that the district court did not err in applying the career-offender Guideline to Martinez-Noriega because the agreement only resolved the defendant's base offense level under Chapter Two, but did not resolve any issues with respect to Chapter Four. *Id.*

Like the agreement in *Martinez-Noriega,* Leach's plea agreement only stipulated to his base offense level under Chapter Two of the Guidelines. Although the parties were free to do so, they did not address possible adjustments "from Part B of Chapter Four," which includes the enhanced offense levels for repeat and dangerous sex offenders against minors pursuant to U.S.S.G. § 4B1.5. Thus, in contrast to *DeWitt,* the government here did not advocate for anything inconsistent with the stipulations of the plea agreement; it advocated for something that was not resolved by the plea agreement. Paragraph ***865** 11 of Leach's plea agreement stated that "[t]he parties understand, acknowledge and agree that there are no agreements between the parties with respect to any Sentencing Guidelines issues other than those specifically listed" and that "[a]s to any other Guidelines issues, the parties are free to advocate their respective positions at sentencing." We conclude, therefore, that the government was free to advocate for the § 4B1.5(a) enhancement because it was an issue that had not been agreed to or specifically listed in the agreement. Accordingly, we hold that the government did not breach the plea agreement.

C. U.S.S.G. § 4B1.5(a)

[5] Having concluded that the government was not precluded from arguing in favor of the § 4B1.5 enhancement, we must now determine whether that section should have been applied. Section 4B1.5, entitled "Repeat and Dangerous Sex Offender Against Minors," states under subsection (a) that:

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(a) In any case in which the defendant's instant offense of conviction is a covered sex crime, § 4B1.1 (Career Offender) does not apply, and the defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction:
(1) The offense level shall be the greater of:
(A) the offense level determined under Chapters Two and Three; or
(B) the offense level from the table below decreased by the number of levels corresponding to any applicable adjustment from § 3E1. 1 (Acceptance of Responsibility):

Offense Statutory Maximum Offense Level

(i) Life.	37.
(ii) 25 years or more.	34.
(iii) 20 years or more, but less than 25 years.	32.
(iv) 15 years or more, but less than 20 years.	29.
(v) 10 years or more, but less than 15 years.	24.
(vi) 5 years or more, but less than 10 years.	17.
(vii) More than 1 year, but less than 5 years.	12..

(2) The criminal history category shall be the greater of: (A) the criminal history category determined under Chapter Four, Part A (Criminal History); or (B) criminal history Category [redacted].

U.S.S.G. § 4B1.5(a).[FN4]

FN4. The plea agreement stipulated that the applicable Guidelines Manual was "the one that took effect on November 5, 2004." Section 4B1.5(a) remains unchanged in the current edition of the Guidelines Manual.

Put simply, Leach would be subject to the § 4B1.5(a) enhancement if: (1) his "instant offense of conviction is a covered sex crime;" (2) the career offender enhancement (§ 4B1.1) does not apply to him; and (3) he "committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction." *Id.* Leach unquestionably meets the first two prerequisites of § 4B1.5(a). His "instant offense of conviction"-knowingly using a facility of interstate commerce to attempt to entice a minor to engage in sexual activity-qualifies as a "covered sex crime" as that term is defined in Application Note 2 to § 4B1.5.[FN5] More specifically, the offense ***866** was perpetrated against a minor [FN6] and fell under 18 U.S.C. § 2422(b) which is under Chapter 117 of Title 18 of the United States Code and thus constituting a "covered sex crime." *See United States [redacted] Blazek,* 431 F.3d 1104, 1110 (8th Cir.2005) (upholding the application of § 4B1.5(a) enhancement and ruling that a conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b) is a "covered sex crime" for purposes of the enhancement, even if the intended victim was an undercover officer and not an actual minor). Additionally, § 4B1.1, the career offender enhancement, does not apply to Leach because he did not have at least two prior felony convictions of either a crime of violence or a controlled substance offense. Therefore, § 4B1.5(a) would apply to Leach if he "committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction."§ 4B1.5(a).

FN5. Application Note 2 of § 4B1.5, entitled "Covered Sex Crime as Instant Offense of Con-

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viction," states:

For purposes of this guideline, the instant offense of conviction must be a covered sex crime, i.e.: (A) an offense, perpetrated against a minor, under (i) chapter 109A of title 18, United States Code; (ii) chapter 110 of such title, not including trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense; (iii) chapter 117 of such title, not including transmitting information about a minor or filing a factual statement about an alien individual; or (B) an attempt or conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note.

> FN6. Although Application Note 1 to § 4B1.5, defines "minor" as a person under the age of 18 and defines "minor victim" to include "an undercover law enforcement officer who represented to the defendant that the officer was a minor," this court has specifically held that a conviction for attempted enticement of a minor under 18 U.S.C. § 2422(b)-Leach's instant offense of conviction-is a "covered sex crime" for purposes of § 4B1.5 even though the intended victim was in fact an undercover law enforcement officer. *United States* [redacted] *Blazek,* 431 F.3d 1104, 1110 (8th Cir.2005).

It is undisputed that Leach committed the instant offense of conviction after he pleaded guilty to the Kansas offense-attempted aggravated criminal sodomy. However, sentencing on Leach's Kansas offense was pending when the district court sentenced him on the instant offense. Thus, no final judgment of conviction had been entered on the Kansas offense. Leach contends, therefore, that the Kansas offense cannot be counted as a prior "sex offense conviction" for purposes of § 4B1.5(a) because the section does not define whether the term "conviction" requires the defendant to have been sentenced pursuant to the conviction (a final judgment of conviction) or whether a "conviction" only requires that the defendant was adjudicated guilty of the offense, whether by the court, jury, or accepted plea of guilty or nolo contendere. If the prior conviction under § 4B1.5(a) only requires that the defendant have been found guilty of the offense, the enhancement would apply to Leach. However, if the prior "conviction" requires that the defendant have been sentenced for the offense and a final judgment of conviction entered, then § 4B1.5(a) would not apply to him.

The district court ruled that the term "conviction" in § 4B1.5(a) was ambiguous. The court noted that the term is not defined in § 4B1.5(a), relying on language from the Supreme Court's decision in *Deal* [redacted] *United States,* 508 U.S. 129, 131-32, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) ("It is certainly correct that the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding," which "includes both the adjudication of guilt and the sentence."). The district court considered that the context of § 4B1.5(a) did not clear up the ambiguity of the term "conviction," so it applied the rule of lenity and found the Kansas offense could not count as a prior sex conviction under the section.

We disagree with the district court's interpretation and find that the context of § 4B1.5-much like the context of the statute at issue in *Deal*-makes "it unambiguous that 'conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *See id.* at 132, 113 S.Ct. 1993. The first clause of § 4B1.5(a) speaks of "the instant offense of conviction," which is ***867** the crime for which the defendant was now to be sentenced, and for which the enhancement would apply if the defendant has a previous sex offense conviction. *See*§ 4B1.5(a). The term "conviction" in § 4B1.5(a) therefore cannot mean a judgment of conviction. Clearly, the term conviction refers to a conviction without an entry of final judgment in the phrase "instant offense of conviction" because the sentencing was not yet complete. The term should be read to have the same meaning when used later in the same sentence unless otherwise stated or implied.[FN7] We do not read § 4B1.5(a) as requiring the formal entry of a judgment of conviction before a defendant is considered convicted for the provision's enhancements to apply. Any other reading is at best strained. *See Deal,* 508 U.S. at 132, 113 S.Ct. 1993 (finding that if "conviction" in § 924(c)(1) meant "judgment of conviction," then "the provision would be

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incoherent, prescribing that a sentence which has already been imposed ... shall be 5 or 20 years longer than it was").

> FN7. Essentially, Leach argues for one definition of "conviction" the first time it appears in § 4B1.5(a)-an adjudication of guilt-and a different definition for "conviction" the second time the term is used-a judgment of conviction requiring a sentence to be imposed. This result would go against one of the basic rules of statutory interpretation-that identical words used in different parts of the same act or statute are intended to have the same meaning. *See Comm'r of Internal Revenue* [redacted] *Lundy,* 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) ("the normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.").

Our reading of the term "conviction" in § 4B1.5(a) as only requiring an adjudication of guilt is confirmed by the "Background" section of § 4B1.5, which states:

The guideline is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public. It applies to offenders whose instant offense of conviction is a sex offense committed against a minor victim. The relevant criminal provisions provide for *increased statutory maximum penalties for repeat sex offenders* and make those increased statutory maximum penalties available if the defendant previously was convicted of any of several federal and state sex offenses (see 18 U.S.C. 2247, 2426). In addition, section 632 of Public Law 102-141 and section 505 of Public Law 105-314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors. Section 401(i)(1)(A) of Public Law 108-21 directly amended Application Note 4(b)(i), effective April 30, 2003.

U.S.S.G. § 4B1.5 cmt. Background (Emphasis added).

As stated above, § 4B1.5"is intended to provide lengthy incarceration for offenders who commit sex offenses against minors and who present a continuing danger to the public," and to increase the maximum penalties for "repeat sex offenders." Requiring a "repeat sex offender," such as Leach, to have been sentenced for a prior sex offense against a minor, when he has already been adjudicated guilty of the offense does nothing to effectuate the stated intent of the enhancement.

(a) Maximum term of imprisonment.-The maximum term of imprisonment for a violation of this chapter *after a prior sex offense conviction* shall be twice the term of imprisonment otherwise provided by this chapter, unless section **3559(e)** applies.

(b) Definitions.-In this section-

***868** (1) the term *"prior sex offense conviction" means a conviction for an offense-*

(A) under this chapter, chapter 109A, or chapter 110; or

(B) *under State law for an offense consisting of conduct that would have been an offense under a chapter referred to in paragraph (1) if the conduct had occurred within the special maritime and territorial jurisdiction of the United States;*

....

18 U.S.C. § 2426 (emphasis added).

Although this section does not explicitly state whether a "conviction" requires sentencing to have occurred, subsection (a) of § 2426 doubles a defendant's maximum term of imprisonment if the defendant had a prior "sex offense conviction" against a minor. 18 U.S.C. § 2426. In the plea agreement entered into in this case, Leach acknowledged, in the "Statutory Penalties" section of his plea agreement, that upon pleading guilty to Count One of the indictment, his maximum sentence was 60 years "pursuant to 18 U.S.C. § 2426(a) *because said offense occurred after [Leach] had a prior sex offense conviction....* " Plea Agreement ¶ 5 (emphasis added). Because the phrase "sex offense conviction" in § 4B1.5(a) is defined as "any offense described in 18 U.S.C. 2426(b)(1)(A) or (B), if the offense was perpet-

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rated against a minor" and Leach stipulated in his plea agreement that his maximum sentence would be doubled to 60 years under 18 U.S.C. § 2426(a) because the Kansas offense qualified as a prior "sex offense conviction" against a minor, Leach essentially stipulated in the plea agreement that the Kansas offense was a prior "sex offense conviction" under § 2426(b)(1)(A).

Because we find that § 4B1.5(a) applies to Leach, we need not address the merits of the district court's decision regarding the inapplicability of § 4B1.5(b), as subsection (b) can only apply if subsection (a) is inapplicable. U.S.S.G. § 4B1.5(b).

III. *Conclusion*

Accordingly, we vacate Leach's sentence and remand the case for resentencing in accordance with this decision.

C.A.8 (Mo.),2007.
U.S. [redacted]. Leach
491 F.3d 858

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Slip Copy, 2007 WL 3273402 (W.D.Ky.)
(Cite as: Slip Copy)

H
U.S. [redacted]. Moore
W.D.Ky.,2007.
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky,
at Louisiville.
UNITED STATES of America, Plaintiff
v.
James Terry MOORE, Defendant.
Criminal Action No. 3:06-CR-98-S.

Nov. 5, 2007.

Jo E. Lawless, U.S. Attorney Office, Louisville, KY, for Plaintiff.
[redacted] J. Bouldin, Western Kentucky Federal Community Defender, Inc., Louisville, KY, for Defendant.

MEMORANDUM OPINION

CHARLES R. SIMPSON, III, United States District Judge.

***1** This matter is before the court upon the motion of the defendant, James Terry Moore ("Moore"), to reconsider this court's Memorandum Opinion and Order entered July 9, 2007, which concluded that Moore is subject to a mandatory life sentence pursuant to 18 U.S.C. § **3559(e)**. Moore contends that we should find the penalty provision of 18 U.S.C. § 2251(e) applicable in this case and impose the thirty-five year mandatory minimum sentence.

In September 2006, after having been arrested for advertising and facilitating the distribution of child pornography on the Internet, Moore pled guilty to violations of 18 U.S.C. §§ 2251(d)(1)(A), (d)(2)(B), 2252A(a)(2), (a)(5)(B), (b)(1), and (b)(2). At that time the court advised Moore that under 18 U.S.C. § 2251(e) he faced a mandatory minimum penalty of thirty-five years imprisonment and a maximum of life imprisonment. The United States now asserts that 18 U.S.C. § **3559(e)** mandates that Moore receive a life sentence.

In this court's Memorandum Opinion and Order entered July 9, 2007, we noted that Moore qualified for sentencing under both § 2251(e) and § **3559(e)**. We also noted that if irreconcilable sentencing provisions applicable to the same offense were enacted simultaneously, "the last in order or arrangement controls."*See United States [redacted] Moore,* Criminal Action No. 3:06-CR-98-S Memorandum Opinion (July 9, 2007) (citing *United States, ex rel. Harris [redacted] Daniels,* 279 Fed. 844 (2nd Cir.1922)). Recognizing that both § 2251(e) and § **3559(e)** were enacted simultaneously as part of the Prosecutorial Remedies and Tools Against the Exploitation4 of Children Today Act of 2003, Pub.L. 108-21, 117 Stat. 650, we held that since § **3559(e)** was later in arrangement, both in Title 18 of the U.S.Code and in Pub. 108-21, it prevails. Thus we concluded that Moore was subject to mandatory life imprisonment for his offenses under 18 U.S.C. § 2251. Moore now urges us to apply the rule of lenity and impose the thirty-five year mandatory minimum sentence provided for in § 2251(e).

The rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive scope of criminal statutes, but also to the penalties they impose. *Bifulco [redacted] United States,* 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed .2d 205 (1980)."This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."*Ladner [redacted] United States,* 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199 (1958). However, the "touchstone" of the rule of lenity is statutory ambiguity.*Bifulco,* 447 U.S. at 387. The rule of lenity is generally inapplicable unless "after seizing everything from which aid can be derived" the court is still left with an ambiguity. *Chapman [redacted] United States,* 500 U.S. 453, 463, 111 S.Ct. 1919, 1926, 114 L.Ed.2d 524 (quoting *United*

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States [redacted] *Bass,* 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971)).

***2** The rule of lenity is inapplicable to this case. Application of the rule is predicated on statutory ambiguity. This court is not faced with any ambiguity insofar as whether § **3559(e)** is applicable to Moore based on his current criminal conduct and past criminal convictions. The plain language of § **3559(e)** applies directly to Moore and mandates a life sentence. Simply because Moore's criminal conduct also places him within § 2551(e) does not give rise to any ambiguity as to whether Moore's conduct places him within the ambit of § **3559(e)**. This court is not applying the mandatory life sentence of § **3559(e)** based simply on a guess as to what Congress intended. Rather this court is applying the mandatory life sentence based on the fact that Moore's criminal conduct and past criminal convictions place him directly within § **3559(e)**, and § **3559(e)** prevails over § 2551(e) because it is later in order of arrangement in the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003. Accordingly, we will deny Moore's motion for reconsideration.

A separate order will be entered herein this date in accordance with this opinion.

W.D.Ky.,2007.
U.S. [redacted]. Moore
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H
U.S. [redacted]. Moore
W.D.Ky.,2007.
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United States District Court, W.D. Kentucky,
at Louisiville.
UNITED STATES of America, Plaintiff
v.
James Terry MOORE, Defendant.
Criminal Action No. 3:06-CR-98-S.

July 5, 2007.

Jo E. Lawless, U.S. Attorney Office, Louisville, KY, for Plaintiff.
Patrick J. Bouldin, Western Kentucky Federal Community Defender, Inc., Louisville, KY, for Defendant.

MEMORANDUM OPINION

CHARLES R. SIMPSON III, United States District Judge.

***1** This matter is before the court upon the parties' briefs regarding sentencing of the defendant, James Terry Moore ("Moore"). Moore, due to his prior sex convictions involving minors, faces statutory mandatory sentencing. At issue is whether the mandatory life sentence provided for in 18 U.S.C. § **3559(e)** or the thirty-five years to life range contemplated by 18 U.S.C. § 2251(e) should be applied to him.

In September 2006, after having been arrested for advertising and facilitating the distribution of child pornography on the internet, Moore pled guilty to violations of 18 U.S.C. §§ 2251(d)(1)(A), (d)(2)(B), 2252A(a)(2), (a)(5)(B), (b)(1), and (b)(2). At that time the court advised Moore that under 18 U.S.C. § 2259(e) he faced a mandatory minimum penalty of thirty-five years imprisonment and a maximum of life imprisonment. Now, the United States asserts that 18 U.S.C. § **3559(e)** mandates Moore receive a life sentence.

In short, § 2251(e) and § **3559(e)** conflict, as Moore qualifies for sentencing under both. When two statutes conflict and cannot be reconciled, "the general rule of statutory interpretation is that a subsequent statutory provision prevails over a pre-existing and irreconcilably conflicting provision which is not expressly repealed ." 73 Am. Jr.2d *Statutes* § 169 (2007). This rule, however, is inapplicable here given that § 2251(e), in its most current form, and § **3559(e)** were enacted simultaneously as part of the Prosecutorial Remedies and Tools Against the Exploitations of Children Today Act of 2003, Pub.L. No. 108-21, 117 Stat. 650.Thus, the more precise issue becomes: if Congress has simultaneously enacted irreconcilable sentencing provisions applicable to the same offense, which applies?

United States, ex rel. Harris [redacted] *Daniels,* 279 Fed. 844 (2nd Cir.1992), provides guidance on this issue. In *Ex. rel. Harris,* the Second Circuit was faced with a potential conflict between two sentencing provisions, one which permitted " 'all sentences' of summary court-martial [to] be carried into effect upon the approval of the senior officer present ...", and another, which provided "that the Secretary of the Navy may set the proceedings of the court aside and 'remit or mitigate in whole or in part the sentence imposed.' " *Id.* at 849.Although the court ultimately decided that the "apparent conflict [was not] one in reality[ ]," it first stated:

In consideration of irreconcilable conflicting provisions, if both were enacted at the same time, the last in order or arrangement controls.

Id. (citing [redacted] *Equator M & S Co.,* Fed. Cas. No. 5931; *In re Richards,* 96 Fed. 935, 939;*In re Tune,* 115 Fed. 906, 911;*United States* [redacted] *Jackson,* 143 Fed. 783;*Howard* [redacted] *Bangor & A.R. Co.,* 29 Atl. 1101;*State* [redacted] *Public Svc. Comm.,* 172 Pac. 890).

Section **3559(e)** is later in arrangement, both in Title 18 of the U.S.Code and Pub.L. No. 108-21.As

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such, it prevails, subjecting Moore to mandatory life imprisonment. Moreover, an argument exists that § 2251(e) and § **3559(e)** were *not* enacted simultaneously. This argument, if accepted, permits the court to apply the general rule of statutory construction calling for the later enacted provision to control. Section 2559(e) existed at the time at the time § **3559(e)** was enacted. Public Law No. 108-21 merely *amended*§ 2259(e) by raising the mandatory minimum sentence from thirty to thirty-five years. On the other hand, Pub. Law No. 108-21 added an entirely new subsection to § 3559, subsection (e), which provides for mandatory life imprisonment for repeated sex offenses against minors.

***2** Accordingly, the court concludes that pursuant to 18 U.S.C. § **3559(e)** Moore is subject to a sentence of mandatory life imprisonment for his offenses under 18 U.S.C. § 2251. It is so ordered.

W.D.Ky.,2007.
U.S. [redacted]. Moore
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496 F.3d 885
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H
U.S. [redacted]. Peck
C.A.8 (Iowa),2007.

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellee,
[redacted].
Nicholas PECK, Appellant.
No. 06-4187.

Submitted: June 12, 2006.
Filed: Aug. 6, 2007.
Rehearing and Rehearing En BancDenied Sept. 10, 2007.

Background: Defendant pled guilty in the United States District Court for the Northern District of Iowa, Linda R. Reade, Chief Judge, to sexual exploitation of a child, possession of child pornography, and distribution of cocaine. Defendant appealed.

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

(1) government did not breach its plea agreement by advocating for sentencing enhancements;

(2) imposition of enhancements for pattern of activity and exploiting more than one minor was not impermissible double counting; and

(3) sentence of 420 months' imprisonment was not unreasonable.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐273.1(2)

110 Criminal Law
110XV Pleas
110k272 Plea of Guilty
110k273.1 Voluntary Character
110k273.1(2) k. Representations, Promises, or Coercion; Plea Bargaining. Most Cited Cases
Government did not breach its plea agreement with defendant, in which it agreed to file no additional criminal charges, by advocating for sentencing enhancements, where plea agreement expressly permitted government to provide all relevant information to probation office for use in preparing presentence report and the agreement did not contain any provision regarding the advisory guidelines calculations.

[2] Criminal Law 110 ⇐1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
The Court of Appeals can correct an error not raised before the district court if there is error, that is plain, and that affects substantial rights.

[3] Criminal Law 110 ⇐1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
The Court of Appeals will reverse under plain error review only if the error prejudices the party's substantial rights and would result in a miscarriage of justice if left uncorrected.

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[4] Sentencing and Punishment 350H ⇐906

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(G) Dual or Duplicative Use
350Hk903 Particular Cases and Problems
350Hk906 k. Adjustments. Most Cited Cases

Imposition of five-level enhancement for engaging in a pattern of activity involving prohibited sexual conduct, after imposition of three-level enhancement for exploiting more than one minor, for defendant convicted of sexual exploitation of a child and possession of child pornography was not impermissible double counting; separate adjustments for the number of minors exploited and for the fact that those minors were exploited on multiple occasions were not premised on the same conduct. U.S.S.G. §§ 2G2.1(d)(1), **4B1.5(b)(1)**, 18 U.S.C.A.

[5] Criminal Law 110 ⇐1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases

The Court of Appeals reviews de novo whether the district court's application of the sentencing guidelines amounts to impermissible double counting.

[6] Sentencing and Punishment 350H ⇐902

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(G) Dual or Duplicative Use
350Hk902 k. Factor Taken Into Account by Guidelines in General. Most Cited Cases

Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been accounted for by application of another part of the Guidelines; such double counting is permissible where the Sentencing Commission intended the result and each statutory section concerns conceptually separate notions related to sentencing.

[7] Sentencing and Punishment 350H ⇐645

350H Sentencing and Punishment
350HIII Sentence on Conviction of Different Charges
350HIII(D) Disposition
350Hk645 k. Total Sentence Deemed Not Excessive. Most Cited Cases

Sentence of 420 months' imprisonment imposed on defendant convicted of sexual exploitation of a child, possession of child pornography, and distribution of cocaine was not unreasonable, where court considered the statutory sentencing factors, sentence was within the guidelines range, death of one of the victims who defendant described as his "girlfriend" did not call for leniency, and court did consider the letters submitted on defendant's behalf. 18 U.S.C.A. § 3553(a).

[8] Criminal Law 110 ⇐1147

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1147 k. In General. Most Cited Cases

Sentencing and Punishment 350H ⇐651

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases

The Court of Appeals reviews a sentence for reasonableness and in doing so, like the district court, begins with the applicable guidelines sentencing range.

[9] Criminal Law 110 ⇐1144.17

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not

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Shown by Record
110k1144.17 k. Judgment, Sentence, and Punishment. Most Cited Cases
Although a sentence within the applicable guidelines sentencing range is presumed reasonable, the presumption may be rebutted by reference to the statutory sentencing factors. 18 U.S.C.A. § 3553(a).

[10] Sentencing and Punishment 350H ⇐651

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(A) In General
350Hk651 k. Operation and Effect of Guidelines in General. Most Cited Cases
A defendant must show that the district court failed to consider a relevant factor that should have received significant weight, gave significant weight to an improper or irrelevant factor, or considered only appropriate factors but nevertheless committed a clear error of judgment, in order for his sentence within the guidelines range to be considered unreasonable.

[11] Sentencing and Punishment 350H ⇐373

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(G) Hearing
350Hk369 Findings and Statement of Reasons
350Hk373 k. Sufficiency. Most Cited Cases
While the district court is not required to mechanically recite each of the statutory sentencing factors, it must be clear from the record that it actually considered them in determining the appropriate sentence. 18 U.S.C.A. § 3553(a).

***886** Anne M. Laverty, argued, Cedar Rapids, IA, for appellant.
Charles J. Williams, AUSA, argued, Sean R. Berry, AUSA, on the brief, Cedar Rapids, IA, for appellee.

Before MELLOY, SMITH and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

Pursuant to two plea agreements, Nicholas Peck pled guilty to one count of sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a), and one count of distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1). The district court [FN1] sentenced ***887** Peck to 420 months' imprisonment. Peck appeals his sentence, arguing that the Government breached one of the plea agreements, that the district court erred in applying two enhancements under the United States Sentencing Guidelines, and that his sentence is unreasonable. We affirm.

FN1. The Honorable Linda R. Reade, Chief Judge, United States District Court for the Northern District of Iowa.

I. BACKGROUND

S.L., a fifteen-year-old girl, reported to Iowa law enforcement authorities that Peck, a twenty-four-year-old man, was involved in trafficking controlled substances from Illinois to Wisconsin and Iowa. S.L. also reported that Peck had a laptop computer containing pornographic images of her and another minor girl and that Peck had engaged in sex acts with her on six occasions in Iowa and on one occasion in Wisconsin. S.L. also informed the authorities he had given her cocaine.

While driving in Iowa, Peck was pulled over and arrested on an outstanding warrant. During his post-arrest interview, Peck admitted that his computer contained pictures of S.L.'s genitalia and pictures of a male having sex with S.L. Peck falsely denied he was the male pictured having sex with S.L. and also falsely denied that he took the pornographic pictures. Peck admitted he also possessed pornographic pictures of J.C., another fifteen-year-old girl, with whom he admitted to having sex. During the search of Peck's vehicle, authorities seized the following items: a laptop computer, two

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digital cameras, various electronic storage devices including compact discs, a hollowed out pen containing a white powdery residue, a digital scale with a white powdery residue, and a plastic baggie containing several pills. The compact discs revealed digital still and video images of Peck engaged in separate sexual acts with S.L., J.C., and another minor, [redacted]. At least one of the images depicted Peck having sexual intercourse with [redacted], and several depicted Peck engaging in sexual acts with J.C. and displayed J.C.'s genitalia.

Following his arrest and release, Peck twice sold cocaine to a confidential informant, again resulting in his arrest. In this post-arrest interview, Peck admitted that he took the pornographic images of S.L. found on his laptop computer and admitted that he knew S.L. was fifteen years old when the pictures were taken. He also admitted that he took nude pictures of [redacted], knowing that she was either fourteen or fifteen years old.

Peck was indicted in the Northern District of Iowa and charged with one count of sexual exploitation of a child, in violation of 18 U.S.C. § 2251(a), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a). Peck pled guilty to these charges pursuant to a plea agreement ("first plea agreement"). Peck was subsequently indicted in the Western District of Wisconsin and charged with one count of distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1). The drug charge was transferred pursuant to Rule 20 of the Federal Rules of Criminal Procedure to the Northern District of Iowa, where Peck pled guilty pursuant to a second plea agreement. The two cases were then consolidated for sentencing.

In paragraph three of the first plea agreement, the Government promised that it would "file no additional Title 18 criminal charges based upon information now in [its] possession." Paragraph five of the plea agreement stated that, in imposing sentence:

[T]he court will ... consider the kinds of sentence and the sentencing range established by the United States Sentencing Guidelines for the applicable category of offense(s) committed by defendant and will consider any pertinent policy statements issued as part of the ***888** Guidelines. The court will consider relevant adjustments under the United States Sentencing Guidelines, which will include a review of such things as the defendant's role in the offense, his criminal history, his acceptance or lack of acceptance of responsibility and other considerations. The court may also consider other information including any information concerning the background, character, and conduct of the defendant.

Paragraph seven provided:The defendant, his attorney and the United States may make whatever comment and evidentiary offer they deem appropriate at the time of the guilty plea, sentencing or any other proceeding related to this case, so long as the offer or comment does not violate any other provision of this agreement. The parties are also free to provide all relevant information to the probation office for use in preparing the presentence report.

Finally, the first plea agreement contained no stipulation or recommendation whatsoever regarding the advisory sentencing guidelines, and it expressly noted that it "did not result in any express or implied promise or guarantee concerning the actual sentence to be imposed by the court."

In accord with paragraph seven of the first plea agreement, the Government provided an offense conduct statement regarding the exploitation and pornography charges to the United States Probation Office and to Peck. In that statement, the Government stated its belief that Peck's advisory guidelines calculation should be enhanced three levels pursuant to U.S.S.G. § 2G2.1(d)(1), because the offense involved exploitation of three separate minors, and also enhanced five levels pursuant to U.S.S.G. § **4B1.5(b)(1)**, because Peck engaged in a pattern of activity involving prohibited sexual activity. The presentence investigation report subsequently prepared by the probation office accounted for this conduct and also recommended the en-

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hancements.

At sentencing, the district court applied the enhancements pursuant to § 2G2.1(d)(1) and § **4B1.5(b)(1)**, giving Peck a total guideline offense level of 42. The district court calculated Peck's criminal history as a category III, which resulted in a final advisory sentencing guideline range of 360 months to life in prison. The district court sentenced Peck to 240 months' imprisonment on the drug charge and 360 months' imprisonment on the sexual exploitation charge, to be served concurrently. The district court also sentenced Peck to 60 months on the pornography charge, to run consecutively to the other sentence, for a final sentence of 420 months' imprisonment. Peck filed a timely notice of appeal.

II. DISCUSSION

A. Plea Agreement

[1][2][3] Peck argues that the Government breached paragraph three of the first plea agreement, but he concedes that our review of this issue is for plain error because he did not present this argument to the district court. We can correct an error not raised before the district court if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Rice,* 449 F.3d 887, 894 (8th Cir.), *cert. denied,*--- U.S. ----, 127 S.Ct. 601, 166 L.Ed.2d 446 (2006) (quotation omitted). "We will reverse under plain error review only if the error prejudices the party's substantial rights and would result in a miscarriage of justice if left uncorrected." *United States v. McCourt,* 468 F.3d 1088, 1093 (8th Cir.2006), *cert. denied,*--- U.S. ----, 127 S.Ct. 1866, 167 L.Ed.2d 356 (2007) (quotation omitted).

***889** Paragraph three of the first plea agreement states: "The U.S. Attorney's Office for this District will file no additional Title 18 criminal charges based upon information now in [its] possession." Peck concedes-as he must-that the Government has not filed any new indictment or information officially charging him with additional crimes, arguing instead that the Government "*effectively* filed additional charges when it advocated, after the execution of the plea agreement, [for] sentencing enhancements" pursuant to U.S.S.G. §§ 2G2.1(d)(1) and **4B1.5(b)(1)**. We disagree.

Peck cites no case, and our research has not revealed one, that supports the proposition that the Government's pursuit of sentencing enhancements breaches a promise not to file additional criminal charges. The case cited by Peck, *United States v. Clark,* 55 F.3d 9 (1st Cir.1995), is inapposite. In *Clark,* the Government agreed not to oppose a three-level downward departure for acceptance of responsibility. *Id.* at 12. In a sentencing memorandum it submitted to the district court, the Government made its position clear that no reduction was warranted, adding that it could not present "a more vigorous argument" because of the plea agreement. *Id.* The First Circuit held that although the Government did not formally oppose the reduction, it effectively opposed it in the memorandum. *Id. Clark* has no bearing on the present scenario. Unlike formally opposing a downward departure, which may be done "effectively" by other informal means such as in a memorandum, there is no way to file criminal charges "effectively." They are either filed or they are not. Here, the Government filed no additional charges, and Peck concedes as much.

Peck also cites *United States v. Fowler,* 445 F.3d 1035 (8th Cir.2006), and *United States v. DeWitt,* 366 F.3d 667 (8th Cir.2004). In *Fowler,* we held that the Government breached a plea agreement by actively advocating for career-offender status where the plea agreement specifically stipulated to an offense level that did not account for such status. *Fowler,* 445 F.3d at 1037. Likewise, in *DeWitt,* we held that the Government breached a plea agreement that stipulated to the drug quantity and base offense level when it presented evidence that the drug quantity and corresponding base offense level should be higher. *DeWitt,* 366 F.3d at

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In contrast to the plea agreements in *Fowler* and *DeWitt,* the plea agreement in this case does not contain any provision whatsoever regarding the advisory guidelines calculations. It does contain general language, not present in the plea agreements in *Fowler* and *DeWitt,* that expressly permits the Government to "provide all relevant information to the probation office for use in preparing the presentence report." Peck's case, therefore, is more akin to our decision in *United States* [redacted] *Stobaugh,* 420 F.3d 796 (8th Cir.2005), *cert. denied,*546 U.S. 1120, 126 S.Ct. 1093, 163 L.Ed.2d 908 (2006). In *Stobaugh,* the plea agreement specified certain guidelines calculations but also stated that the calculations "are only estimates and do not bind the parties." *Id.* at 801. The agreement also contained a provision stating "that information about 'the entirety of the defendant's criminal activities' would be provided to the district court and would 'not [be] limited to the count to which the defendant pled guilty.' " *Id.* Noting that the plea agreement did not contain a more specific provision like that in *DeWitt* that conflicted with the Government's general authority under the plea agreement to present evidence of relevant conduct, we held that there was no breach. *Id.* at 800-01 (citing *DeWitt*).

***890** As in *Stobaugh,* Peck's plea agreement lacks a specific provision that conflicts with the general provision granting the Government express authority to "provide all relevant information to the probation office for use in preparing the presentence report." Absent a conflicting provision, Peck cannot successfully challenge the Government's decision to present to the probation office and to the district court the very information contemplated by paragraph seven of the first plea agreement. Therefore, because the Government did not file additional charges and engaged in conduct expressly authorized by the first plea agreement, we hold that there was no breach. Accordingly, Peck's claim fails to survive our plain error review because without an identified error there is no substantial injustice left uncorrected. *See Rice,* 449 F.3d at 894.

B. Double Counting

[4][5] The district court applied sentencing enhancements pursuant to U.S.S.G. §§ 2G2.1(d)(1) and **4B1.5(b)(1)**. Peck does not dispute that his conduct qualifies him for these enhancements. Rather, Peck contends that the five-level increase to his sentence pursuant to § **4B1.5(b)(1)** impermissibly double counts conduct already accounted for in the three-level enhancement he received pursuant to § 2G2.1(d)(1). We review de novo whether the district court's application of the sentencing guidelines amounts to impermissible double counting. *United States* [redacted] *Kiel,* 454 F.3d 819, 822 (8th Cir.2006).

[6] "Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been ... accounted for by application of another part of the Guidelines." *United States* [redacted] *Jones,* 440 F.3d 927, 929 (8th Cir.), *cert. denied,*--- U.S. ----, 127 S.Ct. 130, 166 L.Ed.2d 95 (2006) (quotations omitted). Such double counting is permissible where "(1) the [Sentencing] Commission intended the result and (2) each statutory section concerns conceptually separate notions related to sentencing." *United States* [redacted] *Hipenbecker,* 115 F.3d 581, 583 (8th Cir.1997).

Section 2G2.1(d)(1) states: "If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction." Peck acknowledged that he sexually exploited three minor children, and the district court applied Chapter Three of the Guidelines as though each of the three minors had been contained in a separate count. This application resulted in an increase of three levels to Peck's base offense level. *See*U.S.S.G. § 3D1.4.

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Section **4B1.5(b)(1)** states: "In any case in which the defendant's instant offense of conviction is a covered sex crime ... and the defendant engaged in a pattern of activity involving prohibited sexual conduct: (1) The offense level shall be 5 plus the offense level determined under Chapters Two and Three...." Peck does not dispute that his conviction for production of child pornography in violation of 18 U.S.C. § 2251(a) constitutes a "covered sex crime" and is "prohibited sexual conduct." A "pattern of activity" for the purposes of § **4B1.5(b)(1)** occurs when the defendant engages in the prohibited sexual conduct with a minor on at least two separate occasions. U.S.S.G. § **4B1.5** , cmt. n. 4(B)(i). Peck also does not dispute that he engaged in prohibited sexual conduct with minor children on at least two separate occasions, thus constituting a pattern of activity involving prohibited sexual conduct.

***891** Peck contends that the district court's imposition of a five-level increase pursuant to § **4B1.5(b)(1)** for engaging in a "pattern of activity" after the imposition of a three-level, multiple-victim enhancement under § 2G2.1(d)(1) constitutes impermissible double counting because both enhancements are premised upon the same conduct-namely, his sexual exploitation of each of the three minor children. Peck's characterization of the targeted harm is too broad.

The application of § 2G2.1(d)(1) punished Peck for exploiting three different minors, while the § **4B1.5(b)(1)** enhancement punished him for exploiting those minors on multiple occasions. *See United States* [redacted] *Schmeilski,* 408 F.3d 917, 920 (7th Cir.2005) (holding that the application of both § 2G2.1(d)(1) and § **4B1.5(b)(1)** does not constitute impermissible double counting). As such, the separate enhancements for the number of minors Peck exploited and for the fact that Peck exploited the minors on multiple occasions are not premised on the same harm. *See id.*(noting that for a defendant who had on only one occasion photographed three minor children engaging in sexually explicit conduct, § 2G2.1(d)(1) would apply because more than one minor was exploited but § **4B1.5(b)(1)** would not because prohibited sexual conduct did not occur on at least two separate occasions). Therefore, because § 2G2.1(d)(1) and § **4B1.5(b)(1)** do not address the same kind of harm, the application of both in calculating Peck's sentence did not constitute double counting under these circumstances.

C. Peck's Sentence

[7][8] "We review appellant's sentence for reasonableness." *United States* [redacted] *Cadenas,* 445 F.3d 1091, 1094 (8th Cir.2006). "In doing so we, like the district court, begin with the applicable guidelines sentencing range." *Id.* The Supreme Court recently held that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." *Rita* [redacted] *United States,* ---- U.S. ----, 127 S.Ct. 2456, 2462, 168 L.Ed.2d 203 (2007). Because the district court properly calculated the advisory sentencing guidelines range for Peck, and because it sentenced Peck within that range, Peck's sentence is cloaked in a presumption of reasonableness. *See id.*

[9][10][11] However, this presumption may be rebutted by reference to the factors listed in 18 U.S.C. § 3553(a). *Cadenas,* 445 F.3d at 1094,*see also United States* [redacted] *Harris,* 493 F.3d 928, 932-33 (8th Cir.2007). In other words, Peck must show that the "district court failed to consider a relevant factor that should have received significant weight, gave significant weight to an improper or irrelevant factor, or considered only appropriate factors but nevertheless committed a clear error of judgment," in order for his sentence within the guidelines range to be considered unreasonable. *Cadenas,* 445 F.3d at 1094. "[W]hile we do not require the district court to mechanically recite each of the § 3553(a) factors, it must be clear from the record that it actually considered them in determining the appropriate sentence." *Id.*

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Peck concedes that the facts considered by the district court in reaching his sentence were "doubtless 'relevant' under 18 U.S.C. § 3553(a)," and he instead argues that "[g]iven the *maximum* sentence permitted by law on the most serious count, [sexual exploitation of a minor], is thirty years, it is reasonable to conclude that a sentence at the bottom of the 360 to life range might be appropriate." While this argument may explain why a different sentence would be reasonable, it fails to explain***892** why the within-guidelines-range sentence he received is unreasonable. *See United States v. Bryant,* 446 F.3d 1317, 1319 (8th Cir.2006) (noting that "there is a range of reasonableness available to the district court in any given case"). Further, to the extent that this argument suggests that the district court should have run his sentence on the possession of child pornography charge concurrently rather than consecutively, we find it to be without merit. The district court's decision to run Peck's sentences consecutively is authorized under the guidelines and is proper under this circuit's case law. *See*U.S.S.G. § 5G1.2(d) ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."); *United States v. Thomas,* 484 F.3d 542, 546 (8th Cir.2007).

Peck argues that because each minor "apparently may have even thought of [Peck] as their boyfriend," there was no evidence to support the district court's conclusion that Peck "preyed upon" teenage girls for sexual relations. We reject Peck's argument and note that the district court's conclusion regarding Peck's conduct is supported by our cases. *See, e.g., United States v. Abad,* 350 F.3d 793, 798 (8th Cir.2003) ("[W]hen sexual **assaults** are committed upon children ..., consent is not a defense. The reason is that the victims in these cases, because of ignorance or deceit, do not understand what is happening to them. Therefore their 'consent' is of no significance.") (quotation omitted).

Peck also contends that the district court did not consider facts in his background that call for leniency, such as the death of his girlfriend and letters submitted to the district court on his behalf. First, the girl Peck claims was his "girlfriend" was actually one of the minor victims he sexually exploited. Her death, though tragic, does not call for leniency vis-a-vis Peck. Second, the record reveals that the district court did consider the letters submitted on Peck's behalf, and nothing in the record demonstrates that they were given inappropriate weight.

Peck's arguments are without merit in that they fail to demonstrate that the district court's sentence was unreasonable. The district court made a clear record of the sentencing factors relevant under § 3553(a), and our review of it shows that the district court considered them, weighed them properly and did not commit a clear error of judgment in arriving at Peck's sentence, which was within the range of choice dictated by the facts of the case. Accordingly, Peck's sentence was not unreasonable. *See Harris,* 493 F.3d at 932-33; *Cadenas,* 445 F.3d at 1094.

III. CONCLUSION

For the foregoing reasons, we affirm Peck's sentence.

C.A.8 (Iowa),2007.
U.S. v. Peck
496 F.3d 885

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U.S. [redacted]. Denkler
C.A.4 (N.C.),2007.
This case was not selected for publication in the Federal Reporter.Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1)
United States Court of Appeals,Fourth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
[redacted].
Phillip Daniel DENKLER, a/k/a George Austin, Defendant-Appellant.
No. 06-4781.

Submitted: March 7, 2007.
Decided: July 10, 2007.

Background: Defendant pled guilty in the United States District Court for the Eastern District of North Carolina, at Raleigh, James C. Dever, III, J., to interstate transportation of a minor with intent to engage in criminal sexual activity and interstate transportation of a stolen vehicle, for which he was sentenced to respective terms of 360 months and 120 months. Defendant appealed.

Holdings: The Court of Appeals held that:

(1) victim's out-of-court statements to investigators had sufficient indicia of reliability to render them admissible for sentencing purposes, and

(2) guidelines departure was reasonable in light of defendant's criminal history and likelihood of recidivism.

Affirmed.

West Headnotes

[1] Sentencing and Punishment 350H ⇐967

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)2 Evidence
350Hk967 k. Hearsay. Most Cited Cases
Victim's out-of-court statements to investigators had sufficient indicia of reliability to render them admissible for sentencing purposes, for determination of whether imposition of enhancement for using threats and force to engage in sex with victim was warranted, in prosecution for interstate transportation of a minor with intent to engage in criminal sexual activity; victim submitted willingly to a medical examination and to interviews by local and federal authorities, and acknowledged that she had engaged in text messaging with other men, and her statement to the agent was consistent with her previous statement to local police. 18 U.S.C.A. § 2423(a); U.S.S.G. § 6A1.3(a), p.s. 18 U.S.C.A.

[2] Sentencing and Punishment 350H ⇐841

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(F) Departures
350HIV(F)2 Upward Departures
350Hk841 k. Inadequacy of Criminal History Category. Most Cited Cases
District court acted reasonably both with respect to its decision to impose departure sentence and with respect to the extent of the divergence from the range, upon finding that defendant's criminal history category substantially underrepresented his criminal history and the likelihood of recidivism, for sentencing on conviction for interstate transportation of a minor with intent to engage in criminal sexual activity; defendant had twice received lenient sentences in state court for offenses against females and, rather than comply with the conditions of probation, he initiated the instant offense. 18 U.S.C.A. §§ 2423(a), 3553(a); U.S.S.G. § 4A1.3, p.s. 18 U.S.C.A.

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***337** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever, III, District Judge. (5:05-cr-00264-D).
Thomas P. McNamara, Federal Public Defender, Devon L. Donahue, Assistant Federal Public Defender, Raleigh, North Carolina, for Appellant. [redacted] E.B. Holding, United States Attorney, Anne M. Hayes, [redacted] P. May-Parker, Assistant United States Attorneys, Raleigh, North Carolina, for Appellee.

Before WILLIAMS, Chief Judge, and KING and SHEDD, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.
Unpublished opinions are not binding precedent in this circuit.PER CURIAM:

****1** Phillip Daniel Denkler pled guilty to interstate transportation of a minor with intent to engage in criminal sexual activity, 18 U.S.C.A. § 2423(a) (West Supp.2006) (Count One), and interstate transportation of a stolen vehicle, 18 U.S.C. § 2312 (2000) (Count Two). He received a sentence of 360 months imprisonment on Count One and a concurrent sentence of 120 months on Count Two. Denkler appeals his sentence, arguing that (1) the district court erred in considering the victim's statement to a federal agent because it lacked sufficient indicia of reliability to support certain fact findings that affected the sentence, *see U.S. Sentencing Guidelines Manual* § 6A1.3(a), p.s. (2005); (2) the district court clearly erred in finding that the victim's ability to appraise or control the situation was substantially impaired after Denkler gave her vodka to drink, USSG § 2G1.3, comment. (n.5 (B)(I)); and (3) the district court abused its discretion by departing upward pursuant to USSG § 4A1.3, p.s., on the ground that criminal history category [redacted] substantially under-represented the seriousness of his criminal history. We affirm.

In August 2005, after serving an eight-month custodial sentence for taking indecent liberties with a thirteen-year-old girl, and then violating probation, Denkler began serving six months electronic house arrest in Rocky Mount, North Carolina. Within a few days, using the name "[redacted]" he had somehow come in contact by telephone with a twelve-year-old girl, who told Denkler she wanted to leave home. On August 25, 2005, driving a car he had stolen from a former roommate, and in possession of a credit card stolen from his mother, Denkler picked up the victim.

On August 30, 2005, Denkler left the victim at a bus station in Des Moines after helping her call her grandparents from there. The victim told her grandparents that "[redacted]" had forced her to have intercourse multiple times. At a local hospital, the victim described the sexual contacts she had with Denkler to local authorities and a Federal Bureau of Investigation (FBI) agent, and identified him from a photographic line-up. She told investigators that Denkler had threatened to kill her if she did not have sex with him, and when she refused to perform oral sex on him, he choked her until she nearly passed out to make her comply. The victim said Denkler refused to let her call her grandparents during ***338** the trip. She told the FBI agent that Denkler slapped her and pulled her hair and made her drink a glass of vodka. She also said Denkler told her that, if he went to jail because of her, he would kill her when he got out, and that he would kill her if she was pregnant with his child and had an abortion or gave up the child.

The results of the medical examination were not made available to the investigators or, later, to the court, and investigators were not able to obtain independent evidence that Denkler used force or threats with the victim because she had showered and had been swimming since the last time she and Denkler had intercourse, and the motel room where the last intercourse occurred had been cleaned.

****2** Denkler was arrested on September 1, 2005, in Colorado. He told authorities that he and the victim had consensual intercourse several times during the trip, but denied using force or threats. He said that, on the first night they spent in a motel,

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they had drunk vodka together, after which the victim got "[redacted]" and they had intercourse.

After Denkler's guilty plea, the probation officer calculated the offense level for the sex offense under *U.S. Sentencing Guidelines Manual* § 2G1.3 (2005) (Transportation of Minors to Engage in Prohibited Sexual Contact with a Minor). Denkler had 9 criminal history points, which placed him in criminal history category IV. However, because he qualified for sentencing as a repeat and dangerous sex offender against minors, *see*USSG § **4B1.5** , he was placed in criminal history category [redacted]. The recommended advisory guideline range was 168-210 months imprisonment.

With advance notice to the parties, the district court decided to apply a cross reference in USSG § 2G1.3(c)(3) for offenses involving conduct described in 18 U.S.C.A. § 2241(a) or (b) (West 2000 & Supp.2006), to USSG 2A3.1 (Criminal Sexual Abuse). The court determined that the cross reference applied because it found as a fact that Denkler used force to engage in sexual conduct with the victim, *see*§ 2G1.3, comment. (n.5(B)(i)(I)), and also forced her to drink vodka, which substantially impaired her ability to appraise or control her conduct, *see id.*(n.5 (B)(i)(IV)). The offense level calculated under § 2A3.1 produced a higher offense level than § 2G1.3 or USSG § **4B1.5** (Repeat and Dangerous Sex Offender Against Minors); accordingly, the court applied it.

At sentencing, after the FBI agent who interviewed the victim in the hospital in Des Moines testified, the district court found as a fact that Denkler had used force to engage in sexual conduct with the victim. The court consequently determined that § 2A3.1 applied and recalculated the guideline range as 262-327 months. The court then departed upward, pursuant to USSG § 4A1.3, from criminal history category [redacted] to category VI, which increased the guideline range to 292-365 months. After considering the factors set out in 18 U.S.C.A. § 3553(a) (West 2000 & Supp.2006), the court imposed a sentence of 360 months on Count One and a concurrent 120-month sentence (the statutory maximum) on Count Two. Alternatively, the court stated that, "even if category [redacted] were the appropriate criminal history category, the court would sentence Denkler, pursuant to a variance, to the same sentence of 360 months for Count One and 120 months for Count Two, to run concurrently," because his threats to kill the victim if he went to jail or if she became pregnant and aborted or gave up the child increased the seriousness of the offense and were not accounted for in the offense level.

[1] On appeal, Denkler first challenges the district court's application of § 2A3.1***339** on the ground that the district court erred in relying on information that lacked sufficient indicia of reliability when it determined that he used threats and force to engage in sex with the victim. Policy statement § 6A1.3(a) provides that, in resolving disputes about sentencing factors, the district court "may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy."

****3** Denkler first contends that allowing sentencing courts to rely on hearsay violates the Sixth Amendment, citing *Crawford* [redacted] *Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (addressing right of confrontation at trial), but concedes that other circuits have held that *Crawford* does not apply to sentencing hearings. *See, e.g., United States* [redacted] *Chau,* 426 F.3d 1318, 1323 (11th Cir.2005). Denkler principally argues that the district court should not have relied on the victim's statements to investigators, asserting that she wished to portray herself in a sympathetic light to her grandparents, and to place the blame for the anxiety she caused them on Denkler.

Denkler maintains that the district court ignored certain facts, such as, that the victim used the screen name "sexysatinangel" when text messaging on her cell phone, sexually explicit language was used in some of her text message exchanges, and the clothing she brought on the trip included lace

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thong panties, black lace panties, and a sleeveless shirt with the phrase "no boundaries" on it. Denkler also argues that the court ignored the fact that the medical examination of the victim revealed no indication of forcible intercourse, bruises, or serious injuries. He points out that the medical examination form states that the victim answered "Yes," when asked whether she had "any consensual coitus in the previous 72 hours." With respect to this question, the FBI agent who interviewed the victim testified at sentencing that the doctor who filled out the form told her the question was meant to determine whether there had been recent sexual activity, not whether it had actually been consensual. The agent also testified that the victim was cooperative with her and with the hospital staff, and was "very honest and very credible."

Even though authorities were unable to find evidence to substantiate the victim's statements, we conclude that her statements had sufficient indicia of reliability to support their probable accuracy. She submitted willingly to a medical examination and to interviews by local and federal authorities, and acknowledged that she had engaged in text messaging with other men. Her statement to the FBI agent was consistent with her previous statement to local police. Therefore, the district court did not err in relying on her statements.

Denkler also contends that the district court clearly erred in finding that the victim's ability to appraise or control the situation was substantially impaired after she drank alcohol because the court lacked the information necessary to reach that conclusion. We need not decide this issue because the district court's finding that Denkler used force against the victim to engage in sex with her was supported by the victim's statement and that finding is sufficient to trigger the application of § 2A3.1.

[2] Finally, Denkler maintains that the district court abused its discretion in departing upward from criminal history category [redacted] to category VI. In his view, the guideline sentence adequately accounted for his past criminal conduct and the court departed merely because it was dissatisfied with the length of the guideline sentence.***340** Denkler does not challenge the court's determination that a departure was also warranted based on the high likelihood of recidivism.

****4** Following *United States* [redacted] *Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), we review a sentence for reasonableness. *United States* [redacted] *Hernandez-Villanueva,* 473 F.3d 118, 123 (4th Cir.2007). "When we review a sentence outside advisory sentencing range-whether as a product of a departure or a variance-we consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the range ...." *Id.* A departure pursuant to § 4A1.3 is encouraged, provided that the criminal history category does not account adequately for his past criminal conduct or the likelihood that he will commit other crimes. *United States* [redacted] *Dixon,* 318 F.3d 585, 588 (4th Cir.2003).

Here, the district court decided that criminal history category [redacted] substantially underrepresented Denkler's criminal history, even though the application of § **4B1.5** had already raised him from category IV to category [redacted]. First, the court noted that Denkler was prosecuted in the juvenile court system in Kentucky for stealing his father's car. This finding is based solely on a statement to investigators by Denkler's estranged father that is contained in the presentence report. Although Denkler did not dispute it, no official record of the charge and its disposition was available. The court decided that the offense was similar to Count Two, transportation of a stolen vehicle, and that it could consider both juvenile offenses and prior similar conduct as a basis for departure. While not exhaustive, the factors suggested in § 4A1.3(a) as possible bases for upward departure include "[p]rior sentence(s) not used in computing the criminal history category," and "[p]rior similar *adult* conduct not resulting in a criminal conviction." USSG § 4A1.3 (a)(2)(A), (E) (emphasis added).

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Second, the district court considered the fact that Denkler had previously been charged with statutory rape (for which the court estimated he would have received a custodial sentence of at least 192 months), was permitted to plead guilty to a lesser offense, served a short custodial sentence, violated his probation and then, after being placed on house arrest, absconded to engage in the criminal conduct that resulted in his current prosecution. The background commentary to § 4A1.3 suggests that a defendant who has a history of serious offenses for which he has received very lenient sentences may be in a category that underrepresents his criminal history. The court found that Denkler fit this description.

Last, the court decided that category [redacted] did not adequately represent the likelihood that Denkler would commit similar crimes in the future. The court noted that Denkler had been prosecuted for sexual intercourse with a thirteen-year-old girl and a twelve-year-old girl, and for assaulting another female.[FN1] The court found that Denkler's conduct showed that he had no respect for the law and had "a strong tendency to revert to grossly inappropriate behavior toward females, particularly young girls." The court decided that category VI best represented his criminal history and likelihood of recidivism.

> FN1. Denkler received one criminal history point for a sentence of 30 days custody and 36 months unsupervised probation after he was convicted in 2002 of misdemeanor **assault** on a female.

****5** Denkler argues that category [redacted] adequately addressed his criminal history because it took into account his repeated sexual offenses involving minors, his custodial status when he committed the instant ***341** offense, and the recency of the prior conviction, and he emphasizes that he was awarded criminal history points for all his serious adult sentences. Denkler maintains that the court erred in assuming that he would necessarily have been found guilty of statutory rape had he gone to trial instead of pleading guilty to the lesser offense, and would automatically have received a sentence of 192 months imprisonment. He further maintains that his juvenile conviction for stealing his father's car was not counted because the sentence and the offense were not sufficiently serious, and that the district court decided otherwise without adequate basis for doing so.

After carefully considering Denkler's arguments, we conclude that the district court's decision to depart pursuant to § 4A1.3 was reasonable. Denkler had twice received lenient sentences in state court for offenses against females and, rather than comply with the conditions of probation, he initiated the instant offense. The district court based its decision to depart in part on the under-representation of Denkler's past criminal conduct and in part on the likelihood that he would commit future crimes. Taking the two factors together, the district court could reasonably conclude that an upward departure was warranted.

We must also consider whether the extent of a departure is reasonable. *Hernandez-Villanueva,* 473 F.3d at 123. Here, the court departed upward by one category. The resulting guideline range was 292-365 months, and the sentence of 360 months (the statutory maximum) was within the departure range. The court explained that it chose the maximum sentence in light of several factors set out in § 3553(a), specifically, "the need to protect the public, to deter this defendant, to reflect the seriousness of the offense, and to provide just punishment." The court further stated that it imposed a sentence at the top of the guideline range because of Denkler's "history of violence and predatory behavior, and the court's views on his likelihood to commit similar crimes if released earlier."

The top of the pre-departure range in this case was 327 months, thirty-three months less than the sentence imposed. While it is impossible to be say whether Denkler would exhibit the same predatory tendencies if he were released after a term of imprisonment 327 months, or another term of impris-

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onment that is less than 360 months, the court reasonably concluded that only the maximum sentence was adequate to protect potential victims and punish Denkler for the offenses he committed. We conclude that the length of the sentence was reason- able.

We therefore affirm the sentence imposed by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

****6** *AFFIRMED.*

C.A.4 (N.C.),2007.
U.S. [redacted]. Denkler
232 Fed.Appx. 336, 2007 WL 2012431 (C.A.4 (N.C.))

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H
U.S. [redacted]. Carter
C.A.8 (S.D.),2007.

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Appellee,
[redacted].
William T. CARTER, Appellant.
No. 05-4414.

Submitted: Sept. 26, 2006.
Filed: June 18, 2007.

Background: Defendant was convicted of sexual abuse of a minor and related crimes, and was sentenced to 360 months' imprisonment. The Court of Appeals, 410 F.3d 1017, affirmed convictions but remanded for resentencing. On remand, the United States District Court for the District of South Dakota, Charles B. Kornmann, J., imposed a 295-month sentence, and defendant appealed.

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

(1) defendant forfeited his Ex Post Facto Clause argument, and

(2) district court made adequate findings to support offense level enhancement for obstruction of justice based on perjury.

Affirmed.

Bye, Circuit Judge, filed opinion concurring in part and concurring in the judgment.

West Headnotes

[1] Constitutional Law 92 ⇐2789

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2789 k. Penal Laws in General. Most Cited Cases

Constitutional Law 92 ⇐2790

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(A) Constitutional Prohibitions in General
92k2790 k. Punishment in General. Most Cited Cases
The ex post facto clause is violated when a law defining a crime or increasing punishment for a crime is applied to events that occurred before its enactment, to the disadvantage of the offender. U.S.C.A. Const. Art. 1, § 9, cl. 3.

[2] Criminal Law 110 ⇐1180

110 Criminal Law
110XXIV Review
110XXIV(T) Subsequent Appeals
110k1180 k. In General. Most Cited Cases
In defendant's appeal of sentence that was imposed for sexual abuse of a minor and related crimes after court of appeals remanded his case to district court for resentencing, law of the case doctrine did not preclude defendant's claim that use of a single, less serious offense that occurred after effective date of new version of sentencing guidelines as ground for application of that version of guidelines in his sentencing for more serious offenses that occurred earlier violated Ex Post Facto Clause; although court of appeals in opinion remanding case had rejected defendant's Ex Post Facto claim based on insufficient evidence that any offense occurred after effective date of new guidelines version, court did not rule on specific Ex Post Facto issue raised by defendant on appeal after resentencing. U.S.C.A. Const. Art. 1, § 9, cl. 3; U.S.S.G. § 1B1.11(b)(2), 18 U.S.C.A.

[3] Criminal Law 110 ⇐1042

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110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1042 k. Sentence or Judgment. Most Cited Cases
Defendant forfeited his argument that district court, in resentencing him for sexual abuse of a minor and related offenses, violated Ex Post Facto Clause by using a single, less serious offense that occurred after effective date of new version of sentencing guidelines as ground for application of that version of guidelines in his sentencing for more serious offenses that occurred earlier; defendant did not raise the issue at his original sentencing, on his appeal of that sentence, or at resentencing after remand from court of appeals. U.S.C.A. Const. Art. 1, § 9, cl. 3; U.S.S.G. § 1B1.11(b)(2), 18 U.S.C.A.

[4] Sentencing and Punishment 350H ⇐996

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(H) Proceedings
350HIV(H)3 Hearing
350Hk992 Findings and Statement of Reasons
350Hk996 k. Sufficiency. Most Cited Cases
In sentencing defendant for sexual abuse of a minor and related offenses, district court made adequate findings to support application of sentencing guidelines offense level enhancement for obstruction of justice based on perjury; court stated during sentencing hearing that it found that defendant testified falsely as to all different sexual **assaults**, all of which was testimony on material matters, and added that the finding was based upon what the court saw and heard at trial, and court stated that the evidence in defendant's case was as strong as the court had seen in any case during nine years on the bench and that the court would have found defendant guilty in a bench trial. U.S.S.G. § 3C1.1, 18 U.S.C.A.

***642** Counsel who presented argument on behalf of the appellant was Jana M. Miner, AFPD, Pierre, SD.
***643** Counsel who presented argument on behalf of the appellee was Mikal G. Hanson, AUSA, Pierre, SD.

Before ARNOLD, BYE, and MELLOY, Circuit Judges.

ARNOLD, Circuit Judge.

William Carter was originally sentenced to 360 months in prison after being convicted of sexual abuse of a minor and related crimes. We affirmed his convictions but remanded for resentencing. *See United States v. Carter,* 410 F.3d 1017 (8th Cir.2005)(*Carter I*). After a hearing, the district court [FN1] sentenced Mr. Carter to 295 months' imprisonment. Mr. Carter appeals, contending that the district court violated the *ex post facto* clause of the Constitution by imposing an enhancement under U.S.S.G. § **4B1.5(b)(1)**, and that it erred by imposing an obstruction-of-justice enhancement without making sufficient factual findings, *see*U.S.S.G. § 3C1.1. We affirm.

FN1. The Honorable Charles B. Kornmann, United States District Judge for the District of South Dakota.

I.

[1] We review Mr. Carter's *ex post facto* claim *de novo. See United States v. Mashek,* 406 F.3d 1012, 1016 (8th Cir.2005). The *ex post facto* clause is violated when a law defining a crime or increasing punishment for a crime, *see Collins v. Youngblood,* 497 U.S. 37, 43, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), is applied to events that occurred before its enactment, to the "disadvantage" of the offender, *Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In *Miller v. Florida,* 482 U.S. 423, 435-36, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), the Supreme Court held that retroactive application of state sentencing guidelines that subjected offenders to longer sen-

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tences than they would have received at the time the crime was committed, violated the *ex post facto* clause applicable to the states, *see*U.S. Const., art. I, § 10, c1. 1. And we have held that the *ex post facto* clause applicable to Congress is similarly violated by retroactive application of a more onerous federal sentencing guideline. *United States* [redacted] *Bell,* 991 F.2d 1445, 1448 (8th Cir.1993); *see*U.S. Const. art. I, § 9, cl. 3.

Initially, we note that since the Supreme Court decided *United States* [redacted] *Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621(2005), at least one of our sister circuits has held that the *ex post facto* clause does not apply to the now-advisory guidelines. *See United States* [redacted] *Demaree,* 459 F.3d 791, 794 (7th Cir.2006), *petition for cert. filed,*No. 06-8377 (U.S. Dec. 11, 2006); *see also United States* [redacted] *Barton,* 455 F.3d 649, 655 n. 4 (6th Cir.2006). But in a case decided after *Booker,* we "recognize[d] that 'retrospective application of the Guidelines implicates the *ex post facto* clause,' " though we took into account post-offense amendments to the guidelines when determining the overall reasonableness of the defendant's sentence. *United States* [redacted] *Larrabee,* 436 F.3d 890, 894 (8th Cir.2006) (quoting *Bell,* 991 F.2d at 1448). Given our decision in *Larrabee,* we will proceed to address Mr. Carter's *ex post facto* claim.

The guidelines themselves refer to the *ex post facto* clause: under U.S.S.G. § 1B1.11(a) and (b)(1), courts are directed to apply the version of the guidelines in effect on the date of sentencing unless to do so would violate the *ex post facto* clause, in which case the guidelines in effect on the date of the crime should be used. The so called one-book rule requires***644** that the "Guidelines Manual in effect on a particular date be applied in its entirety." U.S.S.G. § 1B1.11(b)(2). And the guidelines specify that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." U.S.S.G. § 1B1.11(b)(3).

[2] In this appeal, Mr. Carter argues that in his case, by applying the one-book rule, *see*U.S.S.G. § 1B1.11(b)(2), and using the date when the last crime was committed to determine which edition of the guidelines to apply, *cf.* U.S.S.G. § 1B1.11(b)(3), the district court violated the *ex post facto* clause. According to the defendant, the court violated the clause by sentencing him under a version of the guidelines that included U.S.S.G. § **4B1.5(b)(1)**, an enhancement for repeat sex-offenders that went into effect on November 1, 2001, *see*U.S.S.G. app. C, amend. 615, thereby increasing his offense level and guideline sentencing range "for the three most serious pre-November, 2001 grouped Counts." Mr. Carter argues that even if, as we held in *Carter I*, the evidence supported a finding that one of his crimes (Count II) occurred after November 1, 2001, he was unconstitutionally disadvantaged by the application of § **4B1.5(b)(1)** to the three more serious crimes that occurred before that date and could not be grouped with Count II. *Cf. United States* [redacted] *Ortland,* 109 F.3d 539, 547 (9th Cir.1997).

The government maintains that Mr. Carter's claim is precluded by the law-of the-case doctrine because of our ruling against him on an *ex post facto* claim in *Carter I*, 410 F.3d at 1026-27. In general, "the law-of-the-case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona* [redacted] *California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *see also United States* [redacted] *Bartsh,* 69 F.3d 864, 866 (8th Cir.1995).

At the first sentencing hearing, the district court carefully followed the provisions of § 1B1.11. The court first rejected the 2003 guidelines manual in effect at that time based on *ex post facto* concerns, *see* § 1B1.1(a), (b)(1), explaining that the then-current manual might produce a higher sentence because it included a new prohibition on downward departures for sexual crimes and elimin-

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ated a multiple-victim requirement for an enhancement under § **4B1.5(b)**. Then the court referred to the one-book rule, *see*§ 1B1.11(b)(2), and the need to use the guidelines manual in effect when the last crime was committed, *see*§ 1B1.11(b)(3). Following these provisions, the district court applied the manual that "went into effect on November 1, 2001, in between the defendant's offenses of conviction" (though it mistakenly referred to it as the 2002, rather than the 2001, manual). The court found generally that "at least one" of Mr. Carter's crimes occurred after § **4B1.5(b)(1)** went into effect (November 1, 2001), and it also relied on the indictment to determine that Count VII occurred after that date.

In his first appeal, Mr. Carter maintained in his brief that the district court erred by enhancing his sentence under § **4B1.5(b)(1)**"where the prosecution's evidence failed to prove that any of the charged offenses" occurred after that enhancement went into effect. He asserted that the "trial testimony did not prove an offense" after that date and also contended that the district court should have relied on the evidence, rather than the indictment, to determine when Count VII occurred. Significantly, Mr. Carter did not challenge the constitutionality of ***645**§ 1B1.11 (b)(2) or § 1B1.11 (b)(3) or the district court's decision to calculate his sentence by applying only "one book" of sentencing guidelines, *i.e.,* the one in effect when his last crime was committed. And though he now contends that the court should not have relied on the date of a lesser crime to increase his sentence for earlier more serious crimes that could not be grouped with the later crime, in his first appeal he mentioned neither the relative seriousness of the crimes nor their groupability. We rejected Mr. Carter's previous *ex post facto* claim in *Carter I,* 410 F.3d at 1027, because evidence regarding Count II supported the district court's finding that at least one of the crimes occurred after November 1, 2001. We noted that the victim in Count II, who was a minor at the time of the crime, testified that Mr. Carter had sexual contact with her in December, 2001, and, when pressed on cross-examination, estimated the date as "around November 2, 2001." After remand, the district judge reiterated that at least one of Mr. Carter's crimes occurred after § **4B1.5** went into effect, basing his finding on the "trial testimony ... that the contact happened around November 2, 2001."

[3] We agree with Mr. Carter's contention in his reply brief that the law-of-the case doctrine does not apply because we "did not issue a legal ruling" in *Carter I* addressing whether the *ex post facto* clause "prohibits using a single less serious, later offense to justify the retroactive application" of a guideline to increase the sentencing range "for earlier ungrouped more serious offenses." But we did not address the issue because Mr. Carter did not raise it, and we conclude that the issue has been forfeited.

Mr. Carter asserts that he did not raise the argument earlier because at the first sentencing the district court specifically referred only to Count VII and did not mention Count II when deciding to apply the 2001 guidelines. We believe, however, that the argument is not dependent on the court mentioning Count II, but is a challenge to the district court's determination that the 2001 guidelines applied because at least one crime occurred after November 1, 2001. And Mr. Carter's rationale for not making his current *ex post facto* argument is particularly unpersuasive because Counts II and VII are virtually identical: they both charge Mr. Carter with abusive sexual contact with a minor in violation of 18 U.S.C. § 1153, on dates after November 1, 2001, and neither crime was groupable with the earlier more serious offenses, *see*U.S.S.G. § 3D1.2 cmt. (n. 3, 4). Therefore we believe that Mr. Carter's argument would be equally available regardless of whether the district court referred to Count II or Count VII when determining which version of the guidelines to apply.

Not until this appeal did Mr. Carter argue that the *ex post facto* clause precluded the application of the 2001 guidelines even if one of his crimes took

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place after November 1, 2001. This is not simply a case where the defendant appeals an issue that he or she did not present to the district court. *Cf. United States v. Rees,* 447 F.3d 1128, 1130 (8th Cir.2006). Here Mr. Carter did not raise this issue at his first sentencing, in his appeal from that sentence, or at resentencing. We do not permit piecemeal appeals, and we choose not to afford Mr. Carter an opportunity (unavailable to other defendants) to raise a new issue at this late date merely because his case was remanded on other grounds. *See United States v. Palmer,* 297 F.3d 760, 767 (8th Cir.2002); *United States v. Montoya,* 979 F.2d 136, 138 (8th Cir.1992); *United States v. Fiallo-Jacome,* 874 F.2d 1479, 1481-83 (11th Cir.1989). We conclude that Mr. Carter has forfeited his ***646** current *ex post facto* claim, and thus we decline to address it on the merits.

II.

[4] Mr. Carter next argues that the district court failed to make adequate findings to support an obstruction-of-justice enhancement based on perjury, *see*U.S.S.G. § 3C1.1. Since Mr. Carter objected to the enhancement, the court was required to "review the evidence and make independent findings necessary to establish ... obstruction of justice." *United States v. Dunnigan,* 507 U.S. 87, 95, 113 S.Ct. 1111, 122 L.Ed.2d 445 (1993). Although it is preferable for the court "to address each element of the alleged perjury in a separate and clear finding," a finding "that encompasses all of the factual predicates for a finding of perjury" is sufficient. *Id.*

We conclude that there is no merit to Mr. Carter's contention that the district court did not make adequate findings here. The court stated during the sentencing hearing that it found "that Mr. Carter ... testified falsely as to all these different sexual **assaults**, all of which was testimony on material matters." The judge added that he was "making that finding based upon what I saw and heard at trial." At another point, the judge stated that the evidence in Mr. Carter's case was "as strong as [he'd] seen in any case" during nine years on the bench and that he would have found Mr. Carter guilty in a bench trial.

In *Dunnigan,* the Court concluded that the district court's findings that "*the defendant was untruthful at trial with respect to material matters*" and that the defendant's "failure to give truthful testimony on material matters *...were* [sic] *designed to substantially affect the outcome of the case*" were sufficient to support the enhancement. *Id.* (emphasis in *Dunnigan*). The district court undoubtedly made independent findings in Mr. Carter's case, and we believe that the court's statements are substantially similar to those that we have previously concluded are sufficient. *See, e.g., United States v. Kessler,* 321 F.3d 699, 703 (8th Cir.2003).

Finally, we note that Mr. Carter mistakenly relied in his brief on *United States v. Cabbell,* 35 F.3d 1255, 1261 (8th Cir.1994) (quoting *United States v. Willis,* 940 F.2d 1136, 1140 (8th Cir.1991), *cert. denied,*507 U.S. 971, 113 S.Ct. 1411, 122 L.Ed.2d 782 (1993)), for the proposition that an obstruction-of-justice enhancement should not be imposed based upon a defendant's testimony " 'if a reasonable trier of fact could find the testimony true.' " This statement, first made in *Willis,* 940 F.2d at 1140, was based directly on an application note to U.S.S.G. § 3C1.1 (n.l) (1990) that required a sentencing court to evaluate any suspect testimony or statements in the light most favorable to the defendant when determining whether he or she had committed penury. But the Sentencing Commission amended that application note in 1997 "so that it no longer suggests the use of a heightened standard of proof,"U.S.S.G. app. C, amend. 566, and thus there was no longer a basis for our statement in *Willis.* Rather than viewing the evidence favorably to the defendant or to the verdict, the district court now makes independent findings based on a preponderance of the evidence, and we review those findings for clear error only. *See United States v. Guel-Contreras,* 468 F.3d 517, 522

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(8th Cir.2006). Understandably, Mr. Carter does not contend here that the findings of the district court are clearly erroneous.

III.

For all of the above reasons, we affirm the judgment of the district court.

***647** BYE, Circuit Judge, concurring in part and concurring in the judgment.

I join in Part II of the majority's opinion and its judgment. I also agree with Part I to the extent the majority recognizes Carter cannot now assert his *ex post facto* challenge because he did not raise it at resentencing. I write separately because I disagree with the majority's view, expressed in Part I, that Carter could have raised the challenge at his first sentencing or in his appeal from that sentence.

At Carter's resentencing, the district court applied the 2001 Guidelines, citing the conduct in Count VII (Resentencing Tr. at 34) and Count II (Resentencing Tr. at 39) as the basis for their application. Carter objected, arguing the 2000 Guidelines should be used but in doing so merely "restate[d]" the objection raised at the first sentencing-that the Count VII conduct occurred before the 2001 Guidelines' November 1, 2001, effective date. Carter did not argue at resentencing, as he does in this appeal, that, regardless of when committed, the conduct in *Count II* could not be used to apply U.S.S.G. § **4B1.5(b)(*1*)** to grouped Counts IV, [redacted], and VI. Thus, Carter forfeited the *ex post facto* challenge he raises for the first time in this appeal and, as it is committed to our discretion, the majority appropriately declines to review the challenge for plain error. *See Gendron* [redacted] *United States,* 295 F.2d 897, 902 (8th Cir.1961) ("The normal rule is that an appellate court should not consider questions which have not been properly raised in the trial court and upon which the trial court has had no opportunity to pass.").

But I am not as convinced as my colleagues it is reasonable to hold Carter's failure to raise his *ex post facto* challenge at the *first* sentencing or in his *first* appeal against him. At his first sentencing, the district court applied the 2001 Guidelines because it determined the offense charged in Count VII occurred after their effective date. Believing the evidence showed the conduct charged in Count VII occurred in August or September of 2001, Carter appealed, arguing the district court violated the *ex post facto* clause of the Constitution by applying § **4B1.5(b)(1)**, which was not in effect when he committed Count VII. We *agreed* with Carter "[t]he evidence relevant to Count VII that was offered at trial pertained to an incident that occurred in August or September of [2001]." *United States* [redacted] *Carter,* 410 F.3d 1017, 1025 (8th Cir.2005). Still, we affirmed the application of the 2001 Guidelines, finding, *sua sponte*, the conduct charged in *Count II* might have occurred after November 1, 2001, stating, "[W]e cannot conclude that ... the district court clearly erred in determining that the defendant perpetrated at least one of his offenses after the effective date of § **4B1.5(b)(*1*)**." *Id.* at 1027.

The relevance of the timing of the conduct charged in Count II arose "out of the correction of the sentence" and was "made newly relevant by [our] decision-whether by the reasoning or the result." *United States* [redacted] *Lee,* 358 F.3d 315, 326 (5th Cir.2004). In other words, the relevance of the timing of the conduct in Count II "became extant as a consequence of our mandate." *Id.* Since the district court only referenced Carter's Count VII conduct in applying the 2001 Guidelines at the first sentencing, it was not in Carter's interest to point out to the district court the Count II conduct might be an alternative basis for applying the 2001 Guidelines but argue such an application would violate the *ex post facto* clause for the reasons stated in this second appeal. This is especially true here, where Carter's counsel would likely have violated her professional obligation to zealously and competently advocate Carter's position had she volunteered to the district court another***648** means to increase his sentence. *See* S.D. Rules of Prof 1 Conduct preamble ("As advocate, a lawyer zealously asserts the

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client's position under the rules of the adversary system."); *Id.* Rule 1.1 ("A lawyer shall provide competent representation to a client."). Even if she believed the conduct in Count II occurred after the effective date of the 2001 Guidelines (the opposite appears to be true), I do not think her candor obligation required her to hang her client. Nonetheless, I concur in the ultimate outcome of this case for the reasons given.

C.A.8 (S.D.),2007.
U.S. [redacted], Carter
490 F.3d 641

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431 F.3d 1104
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(Cite as: 431 F.3d 1104)

H
U.S. [redacted]. Blazek
C.A.8 (Iowa),2005.

United States Court of Appeals,Eighth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Michael David BLAZEK, Defendant-Appellant.
No. 05-1705.

Submitted: Sept. 13, 2005.
Filed: Dec. 21, 2005.
Rehearing and Rehearing En Banc Denied Feb. 1, 2006.[FN*]

FN* Judge Colloton did not participate in the consideration or decision of this matter.

Background: Defendant was convicted in the United States District Court for the Southern District of Iowa, James E. Gritzner, J., attempted enticement of a minor for sex, travel in interstate commerce to engage in prohibited sex acts with a minor, and two child pornography offenses. Defendant appealed.

Holdings: The Court of Appeals, Loken, Chief Judge, held that:

(1) evidence was sufficient to support conviction for attempted enticement of a minor for sex;

(2) evidence was sufficient to support conviction for travel in interstate commerce to engage in prohibited sex acts with a minor;

(3) prior conviction for abusive sexual contact with minor was admissible;

(4) to support conviction for traveling in interstate commerce to engage in sexual act with minor between the ages of 12 and 16 years old, government was not required to prove that defendant knew specific age of the victim or that he knew that the requisite age difference existed between offender and victim; and

(5) convictions for attempted enticement of a minor for sex, and travel in interstate commerce to engage in prohibited sex acts with a minor were "covered sex crimes," within meaning of sentencing guideline providing for increased sentence upon commission of such crimes.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⇐1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

Criminal Law 110 ⇐1144.13(5)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(5) k. Inferences or Deductions from Evidence. Most Cited Cases

Criminal Law 110 ⇐1144.13(6)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not

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Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(6) k. Evidence Considered; Conflicting Evidence. Most Cited Cases
In reviewing the sufficiency of the evidence to support a conviction, an appellate court views the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict.

[2] Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
Evidence was sufficient to prove defendant intended to entice a minor to engage in illegal sexual activity, as required to support conviction for attempted enticement of a minor for sex; the evidence presented at trial showed that the defendant engaged in explicit sexual conversations over the internet with an undercover officer posing as a 15-year-old male, and then arranged to meet the boy. 18 U.S.C.A. § 2422(b).

[3] Criminal Law 110 ⇐1030(1)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1030 Necessity of Objections in General
110k1030(1) k. In General. Most Cited Cases
A "plain error" is one that is clear or obvious. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

[4] Commerce 83 ⇐82.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases

Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
Evidence was sufficient to prove that defendant intended to have sex with a minor between the ages of 12 and 16, as required to support conviction for travel in interstate commerce to engage in prohibited sex acts with a minor between the ages of 12 and 16; undercover officer posing as minor in internet chat room told defendant about a month before their planned meeting that he was 15 years old and that he would be turning 16 a couple of months after the scheduled meeting, so that when defendant made the interstate trip for the meeting, he intended to meet a boy under the age of 16. 18 U.S.C.A. §§ 2243(a), 2423(b).

[5] Commerce 83 ⇐82.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases

Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
A violation of statute prohibiting travel in interstate commerce to engage in prohibited sex acts with a

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minor between the ages of 12 and 16 turns not on the actual age of the intended victim, but on whether the defendant traveled in interstate commerce with the requisite criminal intent for the purpose of engaging in a sexual act with a minor between the ages of twelve and sixteen. 18 U.S.C.A. § 2423(b).

[6] Criminal Law 110 ⇐369.2(5)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(5) k. Sex Offenses; Offenses Relating to Children. Most Cited Cases
Charged offense of traveling in interstate commerce to engage in sexual act with minor between the ages of 12 and 16 years old was "offense of sexual **assault** ," and thus, defendant's prior conviction for abusive sexual contact with minor was admissible in prosecution for the charged offense, under federal rule of evidence providing for admission of prior sexual **assault** offenses in sexual **assault** prosecutions. 18 U.S.C.A. § 2423(b); Fed.Rules Evid.Rule 413(a, d), 28 U.S.C.A.

[7] Commerce 83 ⇐82.10

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.10 k. Offenses Involving Activity Unlawful Under State Law. Most Cited Cases

Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
To support conviction for traveling in interstate commerce to engage in sexual act with minor between the ages of 12 and 16 years old, it was not necessary for the government to prove that the defendant knew the specific age of the victim or that he knew that the requisite age difference existed between the offender and the victim. 18 U.S.C.A. § 2423(b).

[8] Criminal Law 110 ⇐805(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k805 Form and Language in General
110k805(1) k. In General. Most Cited Cases

Criminal Law 110 ⇐822(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k822 Construction and Effect of Charge as a Whole
110k822(1) k. In General. Most Cited Cases
In reviewing challenges to jury instructions, the Court of Appeals recognizes that the district court has wide discretion in formulating the instructions, and it will affirm if all of the jury instructions, when read as a whole, fairly and adequately contain the law applicable to the case.

[9] Sentencing and Punishment 350H ⇐780

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(E) Prior or Subsequent Misconduct
350Hk780 k. Grade, Degree or Classification of Other Offense. Most Cited Cases
Defendant's convictions for attempted enticement

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of a minor for sex, and travel in interstate commerce to engage in prohibited sex acts with a minor were "covered sex crimes," within meaning of sentencing guideline providing for increased offense level and criminal history category when defendant committed covered sex crime, the career offender provision did not apply, and he committed at least one prior sex offense; the guideline referenced a statute, which specifically included defendant's offenses. 18 U.S.C.A. §§ 2422(b), 2243(a, b); U.S.S.G. § **4B1.5(a)**.

***1106** B. John Burns, argued, Assistant Public Defender, Des Moines, IA, for appellant.
Richard Lee Richards, AUSA, argued, Des Moines, IA, for appellee.

Before LOKEN, Chief Judge, WOLLMAN and BYE, Circuit Judges.

LOKEN, Chief Judge.

Michael Blazek appeals his conviction and sentence on charges of attempted enticement of a minor for sex, travel in interstate commerce to engage in prohibited sex acts with a minor, and two child pornography offenses. He argues that the evidence was insufficient to convict him of the enticement and travel offenses, the district court [FN1] erred in admitting a prior sexual **assault** conviction, a jury instruction was misleading, and the court erred in imposing a sentence enhancement under U.S.S.G. § **4B1.5** for repeated sexual offenses against minors. We affirm.

FN1. The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa.

I.

In July 2001, Blazek entered an internet "male for male" chat room from his computer in Des Moines and then sent an instant message asking "Brian" for his age and location. Brian responded that he was a 15 year old male in Chicago. Brian was in fact Inspector Dan Everett of the Chicago Police Department posing as a teenage boy to investigate internet crimes against children. Blazek and Brian discussed their respective sexual experiences. Blazek stated that he preferred "[y]ounger smooth guys" and described his sexual preferences. Blazek and Brian continued their instant message and e-mail conversations for fifteen months. At the end of May 2002, Blazek became more explicitly sexual, inviting Brian to give him a massage and suggesting it could lead to sex. In July, Blazek gave a detailed description ***1107** of how he would massage Brian and said, "[s]ometimes when guys get playful they lose their clothes." In September, Blazek engaged in graphic sexual conversations, discussing oral sex and suggesting a three-way sexual encounter with one of Brian's friends.

Blazek arranged to meet Brian on October 26 at a restaurant in Chicago. Blazek was arrested when he arrived at the restaurant from Iowa. His internet conversations with "Brian" and his trip to Chicago were the basis for the convictions for attempting to entice a minor to engage in illegal sexual activity in violation of 18 U.S.C. § 2422(b), and for traveling in interstate commerce to engage in an illegal sexual act with a minor in violation of 18 U.S.C. § 2423(a). After Blazek traveled to Chicago, postal inspectors obtained a warrant, searched his apartment, and seized his computer. They found hundreds of images and movies of child pornography. These materials were the basis for his convictions for the receipt and possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(2) and (a)(4)(B).

[1] Blazek argues the evidence was insufficient to convict him of the enticement and interstate travel offenses. In reviewing the sufficiency of the evidence, "[w]e view the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict." *United States v. Gaona-*[redacted] 408 F.3d 500, 504 (8th Cir.2005) (quotation omitted).

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[2] Blazek argues that the evidence was insufficient to prove he intended to entice a minor to engage in illegal sexual activity because Inspector Everett was the one doing the enticing. Like the district court, we disagree. Blazek began the relationship by contacting Brian and engaging in sexual conversations after learning Brian was fifteen. After extensive breaks in their communications, it was usually Blazek who reestablished the internet relationship. The jury instructions included the issues of entrapment and predisposition to commit the crime charged. Given the explicitly sexual talks that preceded Blazek's trip to Chicago in October 2002, a reasonable jury could find that Blazek intended to entice a minor to engage in illegal sex.

On appeal, Blazek argues for the first time that the evidence was insufficient to convict him of attempting to entice a minor because Inspector Everett was not a minor. We review this issue for plain error. Fed.R.Crim.P. 52(b). The contention is based upon a recent decision of the district court in *United States v. Helder,* No. 05-00125-01-Cr. (W.D.Mo. Aug. 5, 2005) (Judgment of Acquittal), a ruling that is now pending on appeal in this court, *United States v. Helder, appeal docketed,* No. 05-3387 (8th Cir. Sep. 1, 2005). The decision in *Helder* is inconsistent with, and did not cite, our decision in *United States v. Patten,* 397 F.3d 1100 (8th Cir.2005), that upheld an attempt conviction under 18 U.S.C. § 2422(b) in which the enticed "minor" was an undercover police officer. Though this issue was not raised or discussed in *Patten,* it was raised and squarely rejected in *United States v. Meek,* 366 F.3d 705, 717-20 (9th Cir.2004); *United States v. Root,* 296 F.3d 1222, 1227-28 (11th Cir.2002), *cert. denied*537 U.S. 1176, 123 S.Ct. 1006, 154 L.Ed.2d 921 (2003); and *United States v. Farner,* 251 F.3d 510 (5th Cir.2001).

[3] A "plain" error is one that is "clear" or "obvious." *United States v. Olano,* 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The Supreme Court discussed *when* an error must be plain in *Johnson v. United States,* 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997):

> ***1108** We ... hold that in a case such as this-where the law at the time of trial was settled and clearly contrary to the law at the time of appeal-it is enough that an error be "plain" at the time of appellate consideration.

In this case, the law at the time of trial was *not* settled in this circuit; we had not addressed the issue. Thus, *Johnson* leaves open the question whether Blazek must prove that the error alleged was plain at the time of trial, which it clearly was not. But in any event, even if the rule in *Johnson* applies, and even if this court should ultimately affirm the district court's decision in *Helder,* thereby creating a conflict with at least three other circuits, the error is not plain at this time. Therefore, the evidence was sufficient to convict Blazek of attempted enticement of a minor.

[4] Finally, Blazek argues the evidence was insufficient to convict him of traveling in interstate commerce "for the purpose of engaging in any sexual act ... with a person under 18 years of age that would be in violation of Chapter 109A" if it occurred within the territorial jurisdiction of the United States. 18 U.S.C. § 2423(b) (2002).[FN2] The indictment charged that Blazek traveled with the intent to engage in a sexual act with a person who had attained the age of twelve years but not the age of sixteen years in violation of 18 U.S.C. § 2243(a), which is part of chapter 109A. Blazek argues that the evidence was insufficient to convict him of a § 2243(a) violation because "Brian" said he was fifteen in July 2001, when Blazek and Brian first met in a chat room, and therefore Brian must have been sixteen by the time Blazek traveled to Chicago in October 2002.

> FN2. This statutory prohibition was reorganized but not substantively altered in 2003. *See*18 U.S.C. §§ 2423(b) and (f).

[5] A § 2423(b) travel violation turns not on the actual age of the intended victim, but on whether the defendant traveled in interstate commerce

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with the requisite criminal intent, here, for the purpose of engaging in a sexual act with a minor between the ages of twelve and sixteen. *See Root,* 296 F.3d at 1231-32. At trial, Inspector Everett testified that "Brian" told Blazek in July 2002, long after their initial conversation, that he was fifteen and would be sixteen in January 2003. In September 2002, the month before the planned meeting in Chicago, Brian again told Blazek he was fifteen. In addition, Postal Inspector Robert Williams testified that, after Blazek's arrest, he told officers that he understood Brian was fifteen. Thus, there was sufficient evidence for a reasonable jury to find that Blazek traveled for the purpose of engaging in a sexual act with someone who was not yet sixteen years old.

II.

[6] At trial, over Blazek's objection, the government introduced evidence of his 1997 conviction for Abusive Sexual Contact with a Minor in violation of 18 U.S.C. § 2244(a)(1) and testimony that the conviction resulted from Blazek's fondling of his eleven-year-old nephew. The district court admitted this evidence under Rule 413(a) of the Federal Rules of Evidence, which provides that, "[i]n a criminal case in which the defendant is accused of an offense of sexual **assault**, evidence of the defendant's commission of another offense ... of sexual **assault** is admissible." Blazek argues that Rule 413(a) does not apply because he was not charged with an "offense of sexual **assault**." Like the district court, we disagree.

Rule 413(d) defines an "offense of sexual **assault**" to include any federal or state crime "that involved-(1) any conduct proscribed***1109** by chapter 109A of title 18, United States Code."Rule 413 does not require that the defendant be charged with a chapter 109A offense, only that the instant offense involve conduct proscribed by chapter 109A. Here, Count Two charged Blazek with violating 18 U.S.C. § 2423(b) by traveling in interstate commerce for the purpose of "knowingly engaging in a sexual act with a person who has attained the age of 12 years but has not attained the age of 16 years." That conduct is proscribed by chapter 109A. *See*18 U.S.C. § 2243. Thus, the district court properly ruled that the prior conviction evidence was admissible under Rule 413. In addition, the court did not abuse its discretion in declining to exclude that evidence as unfairly prejudicial under the Rule 403 balancing test. *See United States* [redacted] *LeCompte,* 131 F.3d 767, 769-70 (8th Cir.1997).

III.

[7] Instruction 15 explained to the jury that the charged travel offense required the government to prove that Blazek traveled for the purpose of engaging in a sexual act with a minor at least twelve but less than sixteen years old. The last sentence of that instruction added: "It is not necessary for the United States to prove that the defendant knew the specific age of the victim or that he knew that the requisite age difference existed between the offender and the victim." On appeal, Blazek argues, as he did to the district court, that the last sentence "is a correct statement of the law, but it is misleading to the jury" because to violate 18 U.S.C. § 2243"the defendant would have to know or have to have an idea as to how old that victim was."

[8] "In reviewing challenges to jury instructions, this Court recognizes that the district court has wide discretion in formulating the instructions, and we will affirm if the entire charge to the jury, when read as a whole, fairly and adequately contains the law applicable to the case." *United States* [redacted] *Sdoulam,* 398 F.3d 981, 993 (8th Cir.2005) (quotations omitted). Here, Instruction 13 told the jury the government must prove that Blazek traveled "for the purpose of engaging in a sexual act ... with an individual that was less than eighteen years of age." Instruction 14 explained that "[t]he government need only prove that the defendant knew, had reason to know or thought that the person was a minor." The challenged sentence in Instruction 15 was consistent with Instructions 13 and

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14 and, as Blazek admits, correctly stated the applicable law. The instructions as a whole were not inherently confusing in requiring the jury to distinguish between the intent to engage in sexual acts with a minor, and specific knowledge of the victim's age. There was no abuse of discretion.

IV.

[9] At sentencing, the district court increased Blazek's offense level and criminal history category under U.S.S.G. § **4B1.5(a) (2001)**,[FN3] which applied when "the defendant's instant offense of conviction is a covered sex crime," the career offender provision does not apply, and the defendant committed the instant offense "subsequent to sustaining at least one sex offense conviction." The court then sentenced Blazek to 235 months in prison, the bottom of his advisory guidelines range. Blazek argues that § 4B 1.5(a) does not apply and therefore his sentence is unreasonable. We review a challenge to the district court's interpretation and application of the advisory guidelines de novo and the court's factual findings for clear error. *United States v. Mashek,* 406 F.3d 1012, 1017 (8th Cir.2005).

FN3. The Guidelines in effect when Blazek committed the offenses of conviction.

***1110** Application note 2 to § **4B1.5** defined "covered sex crime" to include "(A) an offense, perpetrated against a minor, under ... (iii) chapter 117 ... or (B) an attempt or a conspiracy to commit any offense described in subdivisions (A)(i) through (iii) of this note." Blazek's enticement and travel offenses were violations of chapter 117. Application note 1 defined "minor" as a person under the age of 18 but defined "minor victim" to include "an undercover law enforcement officer who represented to the defendant that the officer was a minor." Relying on this distinction, Blazek argues that he did not commit "covered sex crimes" because Inspector Everett was a "minor victim," not a "minor." We disagree. Application note 2 expressly included as covered sex crimes attempts to commit chapter 117 offenses against minors. As explained in Part I of this opinion, this court in *Patten* and at least three other circuits have upheld convictions for attempted enticement under 18 U.S.C. § 2422(b) even though the intended victim was in fact an undercover police officer, because the defendant believed the victim to be a minor. Thus, by including attempts in the definition of covered sex crimes, application note 2 expressly included offenses in which the intended victim was a "minor victim" rather than a "minor," as those terms were defined in application note 1. Because Blazek's offenses of conviction included one or more covered sex crimes (the attempts), and because he admittedly had a prior sex offense conviction, the district court properly applied § **4B1.5(a)**. Blazek does not contend that his sentence was otherwise unreasonable.

The judgment of the district court is affirmed.

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Sandy Berger

From Wikipedia, the free encyclopedia

Samuel Richard "Sandy" Berger (born October 28, 1945) served as the 19th United States National Security Advisor under President Bill Clinton from 1997 to 2001. In his position, he helped to formulate the foreign policy of the Clinton Administration. During this time he advised the President regarding the Khobar Towers bombing, Operation Desert Fox and other actions against Iraq, the NATO bombing campaign against Yugoslavia, responses to the terrorist bombings of American embassies in Kenya and Tanzania, and the administration's policy of engagement with the People's Republic of China.[1] He was also one of the prominent actors of the Camp David 2000 Summit.

Samuel R. "Sandy" Berger

National Security Advisor to President Bill Clinton

Born	October 28, 1945 Sharon, Connecticut
Occupation	Lobbyist, Financial Services Industry, Campaign Advisor
Spouse	Susan Berger
Children	Three

Before joining the administration Berger had worked as an international trade attorney. Currently, he is chairman of an international advisory firm and chairman of the board of an international investment fund. Living in the Georgetown section of Washington, D.C., he is married to Susan Berger and has three children (two daughters and one son).

In April 2005, Berger pled guilty to a misdemeanor charge of unauthorized removal and retention of classified material from the National Archives in Washington. According to the lead prosecutor in the case Berger only took copies of classified information and that no original material was destroyed; however, there is notable controversy and speculation that he might have removed or destroyed originals of other unknown documents as well.

Berger currently serves as a foreign policy adviser to Senator Hillary Clinton in her presidential campaign.[2]

Contents

- 1 Early life
- 2 Clinton administration
  - 2.1 Fined for conflict of interest
  - 2.2 Chinese nuclear espionage
- 3 Post-government
  - 3.1 Convicted of mishandling classified terror documents
- 4 See also
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- 6 References

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Early life

Originally from Millerton, New York where his parents ran an Army-Navy store (and born in nearby Sharon, Connecticut), Berger earned his Bachelor of Arts degree from Cornell University in 1967 and his Juris Doctor (J.D.) degree from Harvard Law School in 1971. At Cornell, Berger was a member of the Quill and Dagger society with Paul Wolfowitz and Stephen Hadley. Opposed to the Vietnam War, Berger began working for Senator [redacted] McGovern's presidential campaign in 1972. While there, he met Bill Clinton, forming a friendship that would last for decades. Berger later urged Clinton to run for president.[3]

After the McGovern campaign, Berger gained experience working in a variety of government posts, including serving as Special Assistant to former New York City Mayor John Lindsay and Legislative Assistant to former U.S. Senator Harold Hughes of Iowa and Congressman Joseph Resnick of New York. He was also Deputy Director of Policy Planning for the U.S. State Department from 1977 to 1980 under Secretary of State Cyrus Vance during the Carter administration.[4]

After leaving the State Department, Berger went on to join the law firm Hogan & Hartson where he helped expand the firm's international law practice. As a partner, he opened the firm's first two international offices, in London and Brussels.[3] "Sandy Berger," Nancy Pelosi said in 1997 prior to becoming Speaker of the House, "was the point person at... Hogan & Hartson... for the trade office of the Chinese government. He was a lawyer-lobbyist."[5]

Clinton administration

Berger served as Senior Foreign Policy Advisor to Governor Clinton during the campaign, and as Assistant Transition Director for National Security of the 1992 Clinton-Gore Transition. During Clinton's first term of office (1993-1997), Berger served as deputy national security advisor, under Anthony Lake in the National Security Council. In Clinton's second term of office, Berger succeeded Lake as Special Assistant to the President for National Security Affairs from 1997 to 2001.

Fined for conflict of interest

In November 1997, Berger paid a $23,000 civil penalty to settle conflict of interest allegations stemming from his failure to sell his stock of Amoco Corporation as ordered by the White House. Berger was advised by the White House to sell the stock in early 1994. Berger said he had planned to sell the stock, but then forgot. He denied knowingly participating in decisions in which he had a financial interest. With no evidence that Berger intended to break the law, the U.S. Justice Department determined a civil penalty was adequate for a "non-willful violation" of the conflict of interest law.[6]

Chinese nuclear espionage

Further information: Cox Report and Timeline of Cox Report controversy

In 1999, Berger was criticized for failing to promptly inform President Clinton of his knowledge that the People's Republic of China had managed to acquire the designs of a number of U.S. nuclear warheads. Berger was originally

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briefed of the espionage by the United States Department of Energy (DOE) in April 1996, but did not inform the president until July 1997.[7][8]

Sandy Berger with President Clinton and Madeleine Albright

A number of Republicans, including then presidential hopeful Lamar Alexander, called for Berger's resignation. They accused him of ignoring the allegations of Chinese espionage. "For his unwillingness to act on this serious matter, Mr. Berger should resign", Alexander said. "If he does not, he should be relieved of his duties by President Clinton."[9] President Clinton rejected the calls: "The record is that we acted aggressively," Clinton said. "Mr. Berger acted appropriately."[10]

> "I asked DOE to widen and deepen its investigation, to intensify as they were planning their counterintelligence efforts to brief the Congress[.] [W]ithin several weeks the FBI had opened up a full investigation on the prime suspect. So I took the actions that I believe were appropriate. I get an awful lot of threat information every day. I have to make a judgment as to what I brief the president on and what I don't. In 1997, when this was clearly a pattern and a systemic problem, I thought it was essential for the president to know — Sandy Berger, May 29, 1999."[11]

Post-government

After leaving the Clinton administration, Berger became chairman of Stonebridge International, an international advisory firm he co-founded in 2001 which focuses on aiding companies in their expansion into markets such as Brazil, China, India, and Russia.[4] Berger is also Chairman of the DB Zwirn Global Advisory Board, an international investment fund and merchant capital provider founded in 2001 and with offices throughout North America, Europe and Asia. [12] Berger is an Advisory Board member for the Partnership for a Secure America, a not-for-profit organization dedicated to recreating the bipartisan center in American national security and foreign policy.

In late 2003, Berger was called to testify before the 9/11 Commission regarding steps taken against terrorism during his tenure and the information he provided to his successor, Condoleezza Rice. At the time, Berger was also acting as an informal foreign policy advisor to Senator John Kerry during his campaign for the presidency. He quit his advisory role after controversy arose regarding his preparations for testifying before the September 11 committee.[13]

Convicted of mishandling classified terror documents

On July 19, 2004, it was revealed that the U.S. Justice Department was investigating Berger for stealing classified documents in October 2003, by removing them from a National Archives reading room prior to testifying before the 9/11 Commission. The documents were five classified copies of a single report commissioned from Richard Clarke, covering internal assessments of the Clinton administration's handling of the unsuccessful 2000 millennium attack plots. An associate of Berger said[14] Berger took

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The National Archives building in Washington, DC

one copy in September 2003 and four copies in October 2003.

When initially questioned by reporters, Berger claimed it was accidental that he put the top-secret copies in his attache-case and handwritten notes in his jacket and pants pockets. He later, in a guilty plea, admitted to deliberately removing the copies and cutting three up with scissors. Archive staff stated they witnessed Berger, on more than one occasion, stuffing into his pants and into his jacket papers he was illegally removing.[15] Two of the copies were recovered by DOJ investigators and returned to the archives.

Berger eventually pleaded guilty to a misdemeanor charge of unauthorized removal and retention of classified material on April 1, 2005. Under a plea agreement, U.S. attorneys recommended a fine of $10,000 and a loss of security clearance for three years. However, on September 8, U.S. Magistrate Judge Deborah Robinson increased the fine to $50,000 at Berger's sentencing. Robinson stated, "The court finds the fine [recommended by government prosecutors] is inadequate because it doesn't reflect the seriousness of the offense."[16] Berger was also ordered to serve two years of probation and to perform 100 hours of community service.[17]

Critics suggest Berger destroyed primary evidence revealing anti-terrorism policies and actions, and that his motive was to permanently erase Clinton administration pre-9/11 mistakes from the public record. Public statements to this effect have been made by talk-radio host Rush Limbaugh,[18] former Clinton campaign advisor Dick Morris,[19] *USA Today* reporter Jack Kelley,[20] multiple times by Fox News correspondent John Gibson (the last as recently as December 2006[21]), and former House Speaker Dennis Hastert (Republican-Illinois), who said: "What information could be so embarrassing that a man with decades of experience in handling classified documents would risk being caught pilfering our nation's most sensitive secrets?"[22]

After a long investigation, the lead prosecutor Noel Hillman, chief of the Justice Department's Public Integrity Section, stated that Berger only removed classified copies of data stored on hard drives stored in the National Archives, and that no original material was destroyed.[23] His and the FBI's opinion of the case initially led *The Wall Street Journal* to editorialize against the allegations.[24][25]

On December 20, 2006, more than a year after Berger pleaded guilty and was sentenced, a report issued by the archives inspector detailed how Berger had perpetrated the crime. Inspector General Paul Brachfeld reported that Berger took a break to go outside without an escort. "In total, during this visit, he removed four documents ... Mr. Berger said he placed the documents under a trailer in an accessible construction area outside Archives 1 (the main Archives building)." Berger acknowledged that he later retrieved the documents from the construction area and returned with them to his office.[26][27]

The report also stated "There were not any handwritten notes on the documents Mr. Berger removed from the archives. Mr. Berger did not believe there was unique information in the three documents he destroyed. Mr. Berger never made any copies of these documents." In the end, according to the report, "[Mr. Berger] substituted his sense of sensitivity instead of thinking of classification" in deciding to remove the documents.[28]

In January 2007, departing Republican staff of The United States House Committee on Oversight and Government Reform released a report titled *Sandy Berger's Theft of Classified Documents: Unanswered Questions*. It states that the FBI or the Department of Justice never questioned Berger about two earlier visits he made on May 30, 2002 and July 18, 2003, when he reviewed White House working papers not yet inventoried by the National Archives, and speculates that, had Berger previously been entirely

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successful in actions at which he was later caught, "nobody would know they were gone." It also contains the FBI's statement as to why they concluded there was no exposure on those dates: "Berger was under constant supervision".[29][17][30] Acting Assistant Attorney General Richard Heating disputed the findings of the Oversight Report and rejected the need for a polygraph since 'no new facts regarding law enforcement aspects of this investigation' had been discovered.[31]

The report did, however, cause the *Wall Street Journal* to, in January 2007, retract their initial opinion of the case, saying there are substantial questions concerning the truth of Berger's statements and that other documents may have been removed. They now argue that Berger's taking of multiple copies of the same document contradict his statement that he took them only for his personal research, since they note that he could have simply taken one copy.[32][15] Mr. Berger continues to insist that he took the copies of the same document for personal convenience, and thought them overclassified (i.e. the information they contained was not actually sensitive to national security).

On May 17, 2007, Berger relinquished his license to practice law as a result of the Justice Department investigation. Saying, "I have decided to voluntarily relinquish my license." He added that, "While I derived great satisfaction from years of practicing law, I have not done so for 15 years and do not envision returning to the profession. I am very sorry for what I did, and I deeply apologize." By giving up his license, Berger avoided cross-examinination by the Bar Counsel regarding details of his thefts.[33]

See also

- History of the United States National Security Council 1993-2003
- Iraq disarmament crisis timeline 1997-2000
- Mary McCarthy (CIA)

External links

- Archives Staff Was Suspicious of Berger (http://www.washingtonpost.com/ac2/wp-dyn/A4189-2004Jul21?language=printer) Washington Post
- United States National Security Council page at the White House website (http://www.whitehouse.gov/nsc/)
- Report on Berger (PDF) (http://i.a.cnn.net/cnn/2006/images/12/21/berger.document.pdf), Office of the Inspector General, National Archives and Records Administration

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Preceded by **Jonathan Howe**	**Deputy National Security Advisor** 1993–1997	Succeeded by **James Steinberg**
Preceded by **Anthony Lake**	**United States National Security Advisor** 1997–2001	Succeeded by **Condoleezza Rice**

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PROTECT ACT ADDS 3559(E)

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PL 108-21, April 30, 2003, 117 Stat 650
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UNITED STATES PUBLIC LAWS
108th Congress - First Session
Convening January 7, 2003

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PL 108-21 (S 151)
April 30, 2003

PROSECUTORIAL REMEDIES AND TOOLS AGAINST THE EXPLOITATION OF CHILDREN TODAY ACT OF 2003 (PROTECT ACT)

AN ACT To prevent child abduction and the sexual exploitation of children, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 18 USCA § 1 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" or "PROTECT Act".

(b) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Severability.

TITLE I--SANCTIONS AND OFFENSES

Sec. 101. Supervised release term for sex offenders.

Sec. 102. First degree murder for child abuse and child torture murders.

Sec. 103. Sexual abuse penalties.

Sec. 104. Stronger penalties against kidnapping.

Sec. 105. Penalties against sex tourism.

Sec. 106. Two strikes you're out.

Sec. 107. Attempt liability for international parental kidnapping.

Sec. 108. Pilot program for national criminal history background checks and feasibility study.

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TITLE II--INVESTIGATIONS AND PROSECUTIONS
Sec. 201. Interceptions of communications in investigations of sex offenses.

Sec. 202. No statute of limitations for child abduction and sex crimes.

Sec. 203. No pretrial release for those who rape or kidnap children.

Sec. 204. Suzanne's law.

TITLE III--PUBLIC OUTREACH
Subtitle A--AMBER Alert
Sec. 301. National coordination of AMBER alert communications network.

Sec. 302. Minimum standards for issuance and dissemination of alerts through AMBER alert communications network.

Sec. 303. Grant program for notification and communications systems along highways for recovery of abducted children.

Sec. 304. Grant program for support of AMBER alert communications plans.

Sec. 305. Limitation on liability.

Subtitle B--National Center for Missing and Exploited Children
Sec. 321. Increased support.

Sec. 322. Forensic and investigative support of missing and exploited children.

Sec. 323. Creation of cyber tipline.

Subtitle C--Sex Offender Apprehension Program
Sec. 341. Authorization.

Subtitle D--Missing Children Procedures in Public Buildings
Sec. 361. Short title.

***651** Sec. 362. Definitions.

Sec. 363. Procedures in public buildings regarding a missing or lost child.

Subtitle E--Child Advocacy Center Grants
Sec. 381. Information and documentation required by Attorney General under Victims of Child Abuse Act of 1990.

TITLE IV--SENTENCING REFORM
Sec. 401. Sentencing reform.

TITLE [redacted]--OBSCENITY AND PORNOGRAPHY
Subtitle A--Child Obscenity and Pornography Prevention

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Sec. 501. Findings.

Sec. 502. Improvements to prohibition on virtual child pornography.

Sec. 503. Certain activities relating to material constituting or containing child pornography.

Sec. 504. Obscene child pornography.

Sec. 505. Admissibility of evidence.

Sec. 506. Extraterritorial production of child pornography for distribution in the United States.

Sec. 507. Strengthening enhanced penalties for repeat offenders.

Sec. 508. Service provider reporting of child pornography and related information.

Sec. 509. Investigative authority relating to child pornography.

Sec. 510. Civil remedies.

Sec. 511. Recordkeeping requirements.

Sec. 512. Sentencing enhancements for interstate travel to engage in sexual act with a juvenile.

Sec. 513. Miscellaneous provisions.

Subtitle B--Truth in Domain Names

Sec. 521. Misleading domain names on the Internet.

TITLE VI--MISCELLANEOUS PROVISIONS

Sec. 601. Penalties for use of minors in crimes of violence.

Sec. 602. Sense of Congress.

Sec. 603. Communications Decency Act of 1996.

Sec. 604. Internet availability of information concerning registered sex offenders.

Sec. 605. Registration of child pornographers in the national sex offender registry.

Sec. 606. Grants to States for costs of compliance with new sex offender registry requirements.

Sec. 607. Safe ID Act.

Sec. 608. Illicit Drug Anti-Proliferation Act.

Sec. 609. Definition of vehicle.

Sec. 610. Authorization of John Doe DNA indictments.

Sec. 611. Transitional housing assistance grants for child victims of domestic violence, stalking, or sexual as-

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sault.

<< 18 USCA § 1 NOTE >>

SEC. 2. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

TITLE I--SANCTIONS AND OFFENSES

<< 18 USCA § 3583 >>

SEC. 101. SUPERVISED RELEASE TERM FOR SEX OFFENDERS.

Section 3583 of title 18, United States Code, is amended--

<< 18 USCA § 3583 >>

(1) in subsection (e)(3), by inserting "on any such revocation" after "required to serve";

<< 18 USCA § 3583 >>

(2) in subsection (h), by striking "that is less than the maximum term of imprisonment authorized under subsection (e)(3)"; and

<< 18 USCA § 3583 >>

(3) by adding at the end the following:

***652** "(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years or life.".

<< 18 USCA § 111 >>

SEC. 102. FIRST DEGREE MURDER FOR CHILD ABUSE AND CHILD TORTURE MURDERS.

Section 1111 of title 18, United States Code, is amended--

<< 18 USCA § 111 >>

(1) in subsection (a)--

(A) by inserting "child abuse," after "sexual abuse,"; and

(B) by inserting "or perpetrated as part of a pattern or practice of assault or torture against a child or children;" after "robbery;"; and

<< 18 USCA § 111 >>

(2) by inserting at the end the following:

"(c) For purposes of this section--

"(1) the term 'assault' has the same meaning as given that term in section 113;

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"(2) the term 'child' means a person who has not attained the age of 18 years and is--

"(A) under the perpetrator's care or control; or

"(B) at least six years younger than the perpetrator;

"(3) the term 'child abuse' means intentionally or knowingly causing death or serious bodily injury to a child;

"(4) the term 'pattern or practice of assault or torture' means assault or torture engaged in on at least two occa- sions;

"(5) the term 'serious bodily injury' has the meaning set forth in section 1365; and

"(6) the term 'torture' means conduct, whether or not committed under the color of law, that otherwise satisfies the definition set forth in section 2340(1).".

SEC. 103. SEXUAL ABUSE PENALTIES.

(a) MAXIMUM PENALTY INCREASES.--(1) Chapter 110 of title 18, United States Code, is amended--

<< 18 USCA § 2251 >>

(A) in section 2251(d)--

(i) by striking "20" and inserting "30"; and

(ii) by striking "30" the first place it appears and inserting "50";

<< 18 USCA § 2252 >>

(B) in section 2252(b)(1)--

(i) by striking "15" and inserting "20"; and

(ii) by striking "30" and inserting "40";

<< 18 USCA § 2252 >>

(C) in section 2252(b)(2)--

(i) by striking "5" and inserting "10"; and

(ii) by striking "10" and inserting "20";

<< 18 USCA § 2252A >>

(D) in section 2252A(b)(1)--

(i) by striking "15" and inserting "20"; and

(ii) by striking "30" and inserting "40"; and

<< 18 USCA § 2252A >>

(E) in section 2252A(b)(2)--

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(i) by striking "5" and inserting "10"; and

(ii) by striking "10" and inserting "20".

(2) Chapter 117 of title 18, United States Code, is amended--

<< 18 USCA § 2422 >>

(A) in section 2422(a), by striking "10" and inserting "20";

<< 18 USCA § 2422 >>

(B) in section 2422(b), by striking "15" and inserting "30"; and

<< 18 USCA § 2423 >>

(C) in section 2423(a), by striking "15" and inserting "30".

<< 18 USCA § 1591 >>

***653** (3) Section 1591(b)(2) of title 18, United States Code, is amended by striking "20" and inserting "40".

(b) MINIMUM PENALTY INCREASES.--(1) Chapter 110 of title 18, United States Code, is amended--

<< 18 USCA § 2251 >>

(A) in section 2251(d)--

(i) by striking "or imprisoned not less than 10" and inserting "and imprisoned not less than 15";

(ii) by striking "and both,";

(iii) by striking "15" and inserting "25"; and

(iv) by striking "30" the second place it appears and inserting "35";

<< 18 USCA § 2251A >>

(B) in section 2251A(a) and (b), by striking "20" and inserting "30";

<< 18 USCA § 2252 >>

(C) in section 2252(b)(1)--

(i) by striking "or imprisoned" and inserting "and imprisoned not less than 5 years and";

(ii) by striking "or both,"; and

(iii) by striking "5" and inserting "15";

<< 18 USCA § 2252 >>

(D) in section 2252(b)(2), by striking "2" and inserting "10";

<< 18 USCA § 2252A >>

(E) in section 2252A(b)(1)--

(i) by striking "or imprisoned" and inserting "and imprisoned not less than 5 years and";

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(ii) by striking "or both,"; and

(iii) by striking "5" and inserting "15"; and

<< 18 USCA § 2252A >>

(F) in section 2252A(b)(2), by striking "2" and inserting "10".

(2) Chapter 117 of title 18, United States Code, is amended--

<< 18 USCA § 2422 >>

(A) in section 2422(b)--

(i) by striking ", imprisoned" and inserting "and imprisoned not less than 5 years and"; and

(ii) by striking ", or both"; and

(B) in section 2423(a)--

<< 18 USCA § 2422 >>

(i) by striking ", imprisoned" and inserting "and imprisoned not less than 5 years and"; and

<< 18 USCA § 2423 >>

(ii) by striking ", or both".

SEC. 104. STRONGER PENALTIES AGAINST KIDNAPPING.

<< 28 USCA § 994 NOTE >>

(a) SENTENCING GUIDELINES.--Notwithstanding any other provision of law regarding the amendment of Sentencing Guidelines, the United States Sentencing Commission is directed to amend the Sentencing Guidelines, to take effect on the date that is 30 days after the date of the enactment of this Act--

(1) so that the base offense level for kidnapping in section 2A4.1(a) is increased from level 24 to level 32;

(2) so as to delete section 2A4.1(b)(4)(C); and

(3) so that the increase provided by section 2A4.1(b)(5) is 6 levels instead of 3.

<< 18 USCA § 1201 >>

(b) MINIMUM MANDATORY SENTENCE.--Section 1201(g) of title 18, United States Code, is amended by striking "shall be subject to paragraph (2)" in paragraph (1) and all that follows through paragraph (2) and inserting "shall include imprisonment for not less than 20 years.".

<< 18 USCA § 2423 >>

SEC. 105. PENALTIES AGAINST SEX TOURISM.

(a) IN GENERAL.--Section 2423 of title 18, United States Code, is amended by striking subsection (b) and inserting the following:

***654** "(b) TRAVEL WITH INTENT TO ENGAGE IN ILLICIT SEXUAL CONDUCT.--A person who travels in

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interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, for the purpose of engaging in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

"(c) ENGAGING IN ILLICIT SEXUAL CONDUCT IN FOREIGN PLACES.--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

"(d) ANCILLARY OFFENSES.--Whoever, for the purpose of commercial advantage or private financial gain, arranges, induces, procures, or facilitates the travel of a person knowing that such a person is traveling in interstate commerce or foreign commerce for the purpose of engaging in illicit sexual conduct shall be fined under this title, imprisoned not more than 30 years, or both.

"(e) ATTEMPT AND CONSPIRACY.--Whoever attempts or conspires to violate subsection (a), (b), (c), or (d) shall be punishable in the same manner as a completed violation of that subsection.

"(f) DEFINITION.--As used in this section, the term 'illicit sexual conduct' means (1) a sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States; or (2) any commercial sex act (as defined in section 1591) with a person under 18 years of age.

"(g) DEFENSE.--In a prosecution under this section based on illicit sexual conduct as defined in subsection (f)(2), it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the person with whom the defendant engaged in the commercial sex act had attained the age of 18 years.".

<< 18 USCA § 3559 >>

(b) CONFORMING AMENDMENT.--Section 2423(a) of title 18, United States Code, is amended by striking "or attempts to do so,".

SEC. 106. TWO STRIKES YOU'RE OUT.

<< 18 USCA § 3559 >>

(a) IN GENERAL.--Section 3559 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(e) MANDATORY LIFE IMPRISONMENT FOR REPEATED SEX OFFENSES AGAINST CHILDREN.--

"(1) IN GENERAL.--A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

"(2) DEFINITIONS.--For the purposes of this subsection--

"(A) the term 'Federal sex offense' means an offense under section 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a ***655** minor into prostitution), or 2423(a) (relating to

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transportation of minors);

"(B) the term 'State sex offense' means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of this title--

"(i) the offense involved interstate or foreign commerce, or the use of the mails; or

"(ii) the conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, on any land or building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country (as defined in section 1151);

"(C) the term 'prior sex conviction' means a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense;

"(D) the term 'minor' means an individual who has not attained the age of 17 years; and

"(E) the term 'state' has the meaning given that term in subsection (c)(2).

"(3) NONQUALIFYING FELONIES.--An offense described in section 2422(b) or 2423(a) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that--

"(A) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain;

"(B) the sexual act or activity would not be punishable by more than one year in prison under the law of the State in which it occurred; or

"(C) no sexual act or activity occurred.".

<< 18 USCA § 2247 >>
<< 18 USCA § 2426 >>

(b) CONFORMING AMENDMENT.--Sections 2247(a) and 2426(a) of title 18, United States Code, are each amended by inserting ", unless section 3559(e) applies" before the final period.

<< 18 USCA § 1204 >>

SEC. 107. ATTEMPT LIABILITY FOR INTERNATIONAL PARENTAL KIDNAPPING.

Section 1204 of title 18, United States Code, is amended--

(1) in subsection (a), by inserting ", or attempts to do so," before "or retains"; and

<< 18 USCA § 1204 >>

(2) in subsection (c)--

(A) in paragraph (1), by inserting "or the Uniform Child Custody Jurisdiction and Enforcement Act" before "and was"; and

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(B) in paragraph (2), by inserting "or" after the semicolon.

<< 42 USCA § 5119a NOTE >>

SEC. 108. PILOT PROGRAM FOR NATIONAL CRIMINAL HISTORY BACKGROUND CHECKS AND FEASIBILITY STUDY.

(a) ESTABLISHMENT OF PILOT PROGRAM.--

(1) IN GENERAL.--Not later than 90 days after the date of the enactment of this Act, the Attorney General shall establish a pilot program for volunteer groups to obtain national ***656** and State criminal history background checks through a 10-fingerprint check to be conducted utilizing State criminal records and the Integrated Automated Fingerprint Identification system of the Federal Bureau of Investigation.

(2) STATE PILOT PROGRAM.--

(A) IN GENERAL.--The Attorney General shall designate 3 States as participants in an 18-month State pilot program.

(B) VOLUNTEER ORGANIZATION REQUESTS.--A volunteer organization in one of the 3 States participating in the State pilot program under this paragraph that is part of the Boys and Girls Clubs of America, the National Mentoring Partnerships, or the National Council of Youth Sports may submit a request for a 10-fingerprint check from the participating State. A volunteer organization in a participating State may not submit background check requests under paragraph (3).

(C) STATE CHECK.--The participating State under this paragraph after receiving a request under subparagraph (B) shall conduct a State background check and submit a request that a Federal check be performed through the Integrated Automated Fingerprint Identification System of the Federal Bureau of Investigation, to the Attorney General, in a manner to be determined by the Attorney General.

(D) INFORMATION PROVIDED.--Under procedures established by the Attorney General, any criminal history record information resulting from the State and Federal check under subparagraph (C) shall be provided to the State or National Center for Missing and Exploited Children consistent with the National Child Protection Act.

(E) COSTS.--A State may collect a fee to perform a criminal background check under this paragraph which may not exceed the actual costs to the State to perform such a check.

(F) TIMING.--For any background check performed under this paragraph, the State shall provide the State criminal record information to the Attorney General within 7 days after receiving the request from the organization, unless the Attorney General determines during the feasibility study that such a check cannot reasonably be performed within that time period. The Attorney General shall provide the criminal history records information to the National Center for Missing and Exploited Children within 7 business days after receiving the request from the State.

(3) CHILD SAFETY PILOT PROGRAM.--

(A) IN GENERAL.--The Attorney General shall establish an 18-month Child Safety Pilot Program that shall provide for the processing of 100,000 10- fingerprint check requests from organizations described in subpara-

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graph (B) conducted through the Integrated Automated Fingerprint Identification System of the Federal Bureau of Investigation.

(B) ELIGIBLE ORGANIZATIONS.--An organization described in this subparagraph is an organization in a State not designated under paragraph (2) that has received a request allotment pursuant to subparagraph (C).

***657** (C) REQUEST ALLOTMENTS.--The following organizations may allot requests as follows:

(i) 33,334 for the Boys and Girls Clubs of America.

(ii) 33,333 for the National Mentoring Partnership.

(iii) 33,333 for the National Council of Youth Sports.

(D) PROCEDURES.--The Attorney General shall notify the organizations described in subparagraph (C) of a process by which the organizations may provide fingerprint cards to the Attorney General.

(E) VOLUNTEER INFORMATION REQUIRED.--An organization authorized to request a background check under this paragraph shall--

(i) forward to the Attorney General the volunteer's fingerprints; and

(ii) obtain a statement completed and signed by the volunteer that--

(I) sets out the provider or volunteer's name, address, date of birth appearing on a valid identification document as defined in section 1028 of title 18, United States Code, and a photocopy of the valid identifying docu- ment;

(II) states whether the volunteer has a criminal record, and, if so, sets out the particulars of such record;

(III) notifies the volunteer that the Attorney General may perform a criminal history background check and that the volunteer's signature to the statement constitutes an acknowledgment that such a check may be conduc- ted;

(IV) notifies the volunteer that prior to and after the completion of the background check, the organization may choose to deny the provider access to children; and

(V) notifies the volunteer of his right to correct an erroneous record held by the Attorney General.

(F) TIMING.--For any background checks performed under this paragraph, the Attorney General shall provide the criminal history records information to the National Center for Missing and Exploited Children within 14 business days after receiving the request from the organization.

(G) DETERMINATIONS OF FITNESS.--

(i) IN GENERAL.--Consistent with the privacy protections delineated in the National Child Protection Act (42 U.S.C. 5119), the National Center for Missing and Exploited Children may make a determination whether the criminal history record information received in response to the criminal history background checks conducted under this paragraph indicates that the provider or volunteer has a criminal history record that renders the

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provider or volunteer unfit to provide care to children based upon criteria established jointly, the National Center for Missing and Exploited Children, the Boys and Girls Clubs of America, the National Mentoring Partnership, and the National Council of Youth Sports.

***658** (ii) CHILD SAFETY PILOT PROGRAM.--The National Center for Missing and Exploited Children shall convey that determination to the organizations making requests under this paragraph.

(4) FEES COLLECTED BY ATTORNEY GENERAL.--The Attorney General may collect a fee which may not exceed $18 to cover the cost to the Federal Bureau of Investigation to conduct the background check under paragraph (2) or (3).

(b) RIGHTS OF VOLUNTEERS.--Each volunteer who is the subject of a criminal history background check under this section is entitled to contact the Attorney General to initiate procedures to--

(1) obtain a copy of their criminal history record report; and

(2) challenge the accuracy and completeness of the criminal history record information in the report.

(c) AUTHORIZATION OF APPROPRIATIONS.--

(1) IN GENERAL.--There is authorized to be appropriated such sums as may be necessary to the National Center for Missing and Exploited Children for fiscal years 2004 and 2005 to carry out the requirements of this sec- tion.

(2) STATE PROGRAM.--There is authorized to be appropriated such sums as may be necessary to the Attorney General for the States designated in subsection (a)(1) for fiscal years 2004 and 2005 to establish and enhance finger print technology infrastructure of the participating State.

(d) FEASIBILITY STUDY FOR A SYSTEM OF BACKGROUND CHECKS FOR EMPLOYEES AND VOLUNTEERS.--

(1) STUDY REQUIRED.--The Attorney General shall conduct a feasibility study within 180 days after the date of the enactment of this Act. The study shall examine, to the extent discernible, the following:

(A) The current state of fingerprint capture and processing at the State and local level, including the current available infrastructure, State system capacities, and the time for each State to process a civil or volunteer print from the time of capture to submission to the Federal Bureau of Investigation (FBI).

(B) The intent of the States concerning participation in a nationwide system of criminal background checks to provide information to qualified entities.

(C) The number of volunteers, employees, and other individuals that would require a fingerprint-based criminal background check.

(D) The impact on the Integrated Automated Fingerprint Identification System (IAFIS) of the Federal Bureau of Investigation in terms of capacity and impact on other users of the system, including the effect on Federal Bureau of Investigation work practices and staffing levels.

(E) The current fees charged by the Federal Bureau of Investigation, States and local agencies, and private

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companies to process fingerprints and conduct background checks.

(F) The existence of "model" or best practice programs which could easily be expanded and duplicated in other States.

(G) The extent to which private companies are currently performing background checks and the possibility ***659** of using private companies in the future to perform any of the background check process, including, but not limited to, the capture and transmission of fingerprints and fitness determinations.

(H) The cost of development and operation of the technology and the infrastructure necessary to establish a nationwide fingerprint-based and other criminal background check system.

(I) The extent of State participation in the procedures for background checks authorized in the National Child Protection Act (Public Law 103-209), as amended by the Volunteers for Children Act (sections 221 and 222 of Public Law 105-251).

(J) The extent to which States currently provide access to nationwide criminal history background checks to organizations that serve children.

(K) The extent to which States currently permit volunteers to appeal adverse fitness determinations, and whether similar procedures are required at the Federal level.

(L) The implementation of the 2 pilot programs created in subsection (a).

(M) Any privacy concerns that may arise from nationwide criminal background checks.

(N) Any other information deemed relevant by the Department of Justice.

(2) INTERIM REPORT.--Based on the findings of the feasibility study under paragraph (1), the Attorney General shall, not later than 180 days after the date of the enactment of this Act, submit to Congress an interim report, which may include recommendations for a pilot project to develop or improve programs to collect fingerprints and perform background checks on individuals that seek to volunteer with organizations that work with children, the elderly, or the disabled.

(3) FINAL REPORT.--Based on the findings of the pilot project, the Attorney General shall, not later than 60 days after completion of the pilot project under this section, submit to Congress a final report, including recommendations, which may include a proposal for grants to the States to develop or improve programs to collect fingerprints and perform background checks on individuals that seek to volunteer with organizations that work with children, the elderly, or the disabled, and which may include recommendations for amendments to the National Child Protection Act and the Volunteers for Children Act so that qualified entities can promptly and affordably conduct nationwide criminal history background checks on their employees and volunteers.

TITLE II--INVESTIGATIONS AND PROSECUTIONS
<< 18 USCA § 2516 >>
SEC. 201. INTERCEPTIONS OF COMMUNICATIONS IN INVESTIGATIONS OF SEX OFFENSES.

Section 2516(1) of title 18, United States Code, is amended--

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<< 18 USCA § 2516 >>

***660** (1) in paragraph (a), by inserting after "chapter 37 (relating to espionage)," the following: "chapter 55 (relating to kidnapping),"; and

<< 18 USCA § 2516 >>

(2) in paragraph (c)--

(A) by inserting "section 1591 (sex trafficking of children by force, fraud, or coercion)," after "section 1511 (obstruction of State or local law enforcement),"; and

(B) by inserting "section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes)," after "sections 2251 and 2252 (sexual exploitation of children),".

<< 18 USCA § 3283 >>

SEC. 202. NO STATUTE OF LIMITATIONS FOR CHILD ABDUCTION AND SEX CRIMES.

Section 3283 of title 18, United States Code, is amended to read as follows:

"§ 3283. Offenses against children

"No statute of limitations that would otherwise preclude prosecution for an offense involving the sexual or physical abuse, or kidnaping, of a child under the age of 18 years shall preclude such prosecution during the life of the child.".

<< 18 USCA § 3142 >>

SEC. 203. NO PRETRIAL RELEASE FOR THOSE WHO RAPE OR KIDNAP CHILDREN.

Section 3142(e) of title 18, United States Code, is amended--

(1) by striking "1901 et seq.), or" and inserting "1901 et seq.),"; and

(2) by striking "of title 18 of the United States Code" and inserting "of this title, or an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title".

<< 42 USCA § 5779 >>

SEC. 204. SUZANNE'S LAW.

Section 3701(a) of the Crime Control Act of 1990 (42 U.S.C. 5779(a)) is amended by striking "age of 18" and inserting "age of 21".

TITLE III--PUBLIC OUTREACH

Subtitle A--AMBER Alert

<< 42 USCA § 5791 >>

SEC. 301. NATIONAL COORDINATION OF AMBER ALERT COMMUNICATIONS NETWORK.

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(a) COORDINATION WITHIN DEPARTMENT OF JUSTICE.--The Attorney General shall assign an officer of the Department of Justice to act as the national coordinator of the AMBER Alert communications network regarding abducted children. The officer so designated shall be known as the AMBER Alert Coordinator of the Department of Justice.

***661** (b) DUTIES.--In acting as the national coordinator of the AMBER Alert communications network, the Coordinator shall--

(1) seek to eliminate gaps in the network, including gaps in areas of interstate travel;

(2) work with States to encourage the development of additional elements (known as local AMBER plans) in the network;

(3) work with States to ensure appropriate regional coordination of various elements of the network; and

(4) act as the nationwide point of contact for--

(A) the development of the network; and

(B) regional coordination of alerts on abducted children through the network.

(c) CONSULTATION WITH FEDERAL BUREAU OF INVESTIGATION.--In carrying out duties under subsection (b), the Coordinator shall notify and consult with the Director of the Federal Bureau of Investigation concerning each child abduction for which an alert is issued through the AMBER Alert communications net- work.

(d) COOPERATION.--The Coordinator shall cooperate with the Secretary of Transportation and the Federal Communications Commission in carrying out activities under this section.

(e) REPORT.--Not later than March 1, 2005, the Coordinator shall submit to Congress a report on the activities of the Coordinator and the effectiveness and status of the AMBER plans of each State that has implemented such a plan. The Coordinator shall prepare the report in consultation with the Secretary of Transportation.

<< 42 USCA § 5791a >>

SEC. 302. MINIMUM STANDARDS FOR ISSUANCE AND DISSEMINATION OF ALERTS THROUGH AMBER ALERT COMMUNICATIONS NETWORK.

(a) ESTABLISHMENT OF MINIMUM STANDARDS.--Subject to subsection (b), the AMBER Alert Coordinator of the Department of Justice shall establish minimum standards for--

(1) the issuance of alerts through the AMBER Alert communications network; and

(2) the extent of the dissemination of alerts issued through the network.

(b) LIMITATIONS.--(1) The minimum standards established under subsection (a) shall be adoptable on a voluntary basis only.

(2) The minimum standards shall, to the maximum extent practicable (as determined by the Coordinator in consultation with State and local law enforcement agencies), provide that appropriate information relating to the

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special needs of an abducted child (including health care needs) are disseminated to the appropriate law enforcement, public health, and other public officials.

(3) The minimum standards shall, to the maximum extent practicable (as determined by the Coordinator in consultation with State and local law enforcement agencies), provide that the dissemination of an alert through the AMBER Alert communications network be limited to the geographic areas most likely to facilitate the recovery of the abducted child concerned.

(4) In carrying out activities under subsection (a), the Coordinator may not interfere with the current system of voluntary coordination between local broadcasters and State and local law enforcement agencies for purposes of the AMBER Alert communications network.

***662** (c) COOPERATION.--(1) The Coordinator shall cooperate with the Secretary of Transportation and the Federal Communications Commission in carrying out activities under this section.

(2) The Coordinator shall also cooperate with local broadcasters and State and local law enforcement agencies in establishing minimum standards under this section.

<< 42 USCA § 5791b >>

SEC. 303. GRANT PROGRAM FOR NOTIFICATION AND COMMUNICATIONS SYSTEMS ALONG HIGHWAYS FOR RECOVERY OF ABDUCTED CHILDREN.

(a) PROGRAM REQUIRED.--The Secretary of Transportation shall carry out a program to provide grants to States for the development or enhancement of notification or communications systems along highways for alerts and other information for the recovery of abducted children.

(b) DEVELOPMENT GRANTS.--

(1) IN GENERAL.--The Secretary may make a grant to a State under this subsection for the development of a State program for the use of changeable message signs or other motorist information systems to notify motorists about abductions of children. The State program shall provide for the planning, coordination, and design of systems, protocols, and message sets that support the coordination and communication necessary to notify motorists about abductions of children.

(2) ELIGIBLE ACTIVITIES.--A grant under this subsection may be used by a State for the following purposes:

(A) To develop general policies and procedures to guide the use of changeable message signs or other motorist information systems to notify motorists about abductions of children.

(B) To develop guidance or policies on the content and format of alert messages to be conveyed on changeable message signs or other traveler information systems.

(C) To coordinate State, regional, and local plans for the use of changeable message signs or other transportation related issues.

(D) To plan secure and reliable communications systems and protocols among public safety and transportation agencies or modify existing communications systems to support the notification of motorists about abductions of children.

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(E) To plan and design improved systems for communicating with motorists, including the capability for issuing wide area alerts to motorists.

(F) To plan systems and protocols to facilitate the efficient issuance of child abduction notification and other key information to motorists during off-hours.

(G) To provide training and guidance to transportation authorities to facilitate appropriate use of changeable message signs and other traveler information systems for the notification of motorists about abductions of chil- dren.

(c) IMPLEMENTATION GRANTS.--

(1) IN GENERAL.--The Secretary may make a grant to a State under this subsection for the implementation of a program for the use of changeable message signs or other motorist information systems to notify motorists about abductions of ***663** children. A State shall be eligible for a grant under this subsection if the Secretary determines that the State has developed a State program in accordance with subsection (b).

(2) ELIGIBLE ACTIVITIES.--A grant under this subsection may be used by a State to support the implementation of systems that use changeable message signs or other motorist information systems to notify motorists about abductions of children. Such support may include the purchase and installation of changeable message signs or other motorist information systems to notify motorists about abductions of children.

(d) FEDERAL SHARE.--The Federal share of the cost of any activities funded by a grant under this section may not exceed 80 percent.

(e) DISTRIBUTION OF GRANT AMOUNTS.--The Secretary shall, to the maximum extent practicable, distribute grants under this section equally among the States that apply for a grant under this section within the time period prescribed by the Secretary.

(f) ADMINISTRATION.--The Secretary shall prescribe requirements, including application requirements, for the receipt of grants under this section.

(g) DEFINITION.--In this section, the term "State" means any of the 50 States, the District of Columbia, or Puerto Rico.

(h) AUTHORIZATION OF APPROPRIATIONS.--There is authorized to be appropriated to the Secretary to carry out this section $20,000,000 for fiscal year 2004. Such amounts shall remain available until expended.

(i) STUDY OF STATE PROGRAMS.--

(1) STUDY.--The Secretary shall conduct a study to examine State barriers to the adoption and implementation of State programs for the use of communications systems along highways for alerts and other information for the recovery of abducted children.

(2) REPORT.--Not later than 1 year after the date of enactment of this Act, the Secretary shall transmit to Congress a report on the results of the study, together with any recommendations the Secretary determines appropri- ate.

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<< 42 USCA § 5791c >>

SEC. 304. GRANT PROGRAM FOR SUPPORT OF AMBER ALERT COMMUNICATIONS PLANS.

(a) PROGRAM REQUIRED.--The Attorney General shall carry out a program to provide grants to States for the development or enhancement of programs and activities for the support of AMBER Alert communications plans.

(b) ACTIVITIES.--Activities funded by grants under the program under subsection (a) may include--

(1) the development and implementation of education and training programs, and associated materials, relating to AMBER Alert communications plans;

(2) the development and implementation of law enforcement programs, and associated equipment, relating to AMBER Alert communications plans;

(3) the development and implementation of new technologies to improve AMBER Alert communications; and

(4) such other activities as the Attorney General considers appropriate for supporting the AMBER Alert communications program.

***664** (c) FEDERAL SHARE.--The Federal share of the cost of any activities funded by a grant under the program under subsection (a) may not exceed 50 percent.

(d) DISTRIBUTION OF GRANT AMOUNTS ON GEOGRAPHIC BASIS.--The Attorney General shall, to the maximum extent practicable, ensure the distribution of grants under the program under subsection (a) on an equitable basis throughout the various regions of the United States.

(e) ADMINISTRATION.--The Attorney General shall prescribe requirements, including application requirements, for grants under the program under subsection (a).

(f) AUTHORIZATION OF APPROPRIATIONS.--(1) There is authorized to be appropriated for the Department of Justice $5,000,000 for fiscal year 2004 to carry out this section and, in addition, $5,000,000 for fiscal year 2004 to carry out subsection (b)(3).

(2) Amounts appropriated pursuant to the authorization of appropriations in paragraph (1) shall remain available until expended.

<< 42 USCA § 5791d >>

SEC. 305. LIMITATION ON LIABILITY.

(a) Except as provided in subsection (b), the National Center for Missing and Exploited Children, including any of its officers, employees, or agents, shall not be liable for damages in any civil action for defamation, libel, slander, or harm to reputation arising out of any action or communication by the National Center for Missing and Exploited Children, its officers, employees, or agents, in connection with any clearinghouse, hotline or complaint intake or forwarding program or in connection with activity that is wholly or partially funded by the United States and undertaken in cooperation with, or at the direction of a Federal law enforcement agency.

(b) The limitation in subsection (a) does not apply in any action in which the plaintiff proves that the National Center for Missing and Exploited Children, its officers, employees, or agents acted with actual malice, or

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provided information or took action for a purpose unrelated to an activity mandated by Federal law. For purposes of this subsection, the prevention, or detection of crime, and the safety, recovery, or protection of missing or exploited children shall be deemed, per se, to be an activity mandated by Federal law.

Subtitle B--National Center for Missing and Exploited Children

SEC. 321. INCREASED SUPPORT.

<< 42 USCA § 5777 >>

(a) IN GENERAL.--Section 408(a) of the Missing Children's Assistance Act (42 U.S.C. 5777(a)) is amended by striking "fiscal years 2000 through 2003" and inserting "fiscal years 2004 through 2005.".

<< 42 USCA § 5773 >>

(b) ANNUAL GRANT TO NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN.-- Section 404(b)(2) of the Missing Children's Assistance Act (42 U.S.C. 5773(b)(2)) is amended by striking "$10,000,000 for each of fiscal years 2000, 2001, 2002, and 2003" and inserting "$20,000,000 for each of the fiscal years 2004 through 2005".

<< 18 USCA § 3056 >>

***665** SEC. 322. FORENSIC AND INVESTIGATIVE SUPPORT OF MISSING AND EXPLOITED CHIL- DREN.

Section 3056 of title 18, United States Code, is amended by adding at the end the following:

"(f) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized, at the request of any State or local law enforcement agency, or at the request of the National Center for Missing and Exploited Children, to provide forensic and investigative assistance in support of any investigation involving missing or exploited children.".

SEC. 323. CREATION OF CYBER TIPLINE.

Section 404(b)(1) of the Missing Children's Assistance Act (42 U.S.C. 5773(b)(1)) is amended--

<< 42 USCA § 5773 >>

(1) in subparagraph (F), by striking "and" at the end;

<< 42 USCA § 5773 >>

(2) in subparagraph (G), by striking the period at the end and inserting "; and"; and

<< 42 USCA § 5773 >>

(3) by adding at the end the following:

"(H) coordinate the operation of a cyber tipline to provide online users an effective means of reporting Internet-related child sexual exploitation in the areas of--

"(i) distribution of child pornography;

"(ii) online enticement of children for sexual acts; and

"(iii) child prostitution.".

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Subtitle C--Sex Offender Apprehension Program

SEC. 341. AUTHORIZATION.

Section 1701(d) of part Q of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd(d)) is amended--

<< 42 USCA § 3796dd >>

(1) by redesignating paragraphs (10) and (11) as (11) and (12), respectively; and

<< 42 USCA § 3796dd >>

(2) by inserting after paragraph (9) the following:

"(10) assist a State in enforcing a law throughout the State which requires that a convicted sex offender register his or her address with a State or local law enforcement agency and be subject to criminal prosecution for failure to comply;".

Subtitle D--Missing Children Procedures in Public Buildings

<< 42 USCA § 5601 NOTE >>

SEC. 361. SHORT TITLE.

This subtitle may be cited as the "Code Adam Act of 2003".

<< 42 USCA § 5792 >>

SEC. 362. DEFINITIONS.

In this subtitle, the following definitions apply:

(1) CHILD.--The term "child" means an individual who is 17 years of age or younger.

(2) CODE ADAM ALERT.--The term "Code Adam alert" means a set of procedures used in public buildings to alert employees and other users of the building that a child is missing.

***666** (3) DESIGNATED AUTHORITY.--The term "designated authority" means--

(A) with respect to a public building owned or leased for use by an Executive agency--

(i) except as otherwise provided in this paragraph, the Administrator of General Services;

(ii) in the case of the John F. Kennedy Center for the Performing Arts, the Board of Trustees of the John F. Kennedy Center for the Performing Arts;

(iii) in the case of buildings under the jurisdiction, custody, and control of the Smithsonian Institution, the Board of Regents of the Smithsonian Institution; or

(iv) in the case of another public building for which an Executive agency has, by specific or general statutory authority, jurisdiction, custody, and control over the building, the head of that agency;

(B) with respect to the Supreme Court Building, the Marshal of the Supreme Court; with respect to the Thurgood Marshall Federal Judiciary Building, the Director of the Administrative Office of United States Courts; and

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with respect to all other public buildings owned or leased for use by an establishment in the judicial branch of government, the General Services Administration in consultation with the United States Marshals Service; and

(C) with respect to a public building owned or leased for use by an establishment in the legislative branch of government, the Capitol Police Board.

(4) EXECUTIVE AGENCY.--The term "Executive agency" has the same meaning such term has under section 105 of title 5, United States Code.

(5) FEDERAL AGENCY.--The term "Federal agency" means any Executive agency or any establishment in the legislative or judicial branches of the Government.

(6) PUBLIC BUILDING.--The term "public building" means any building (or portion thereof) owned or leased for use by a Federal agency.

<< 42 USCA § 5792a >>

SEC. 363. PROCEDURES IN PUBLIC BUILDINGS REGARDING A MISSING OR LOST CHILD.

(a) IN GENERAL.--Not later than 180 days after the date of enactment of this Act, the designated authority for a public building shall establish procedures for locating a child that is missing in the building.

(b) NOTIFICATION AND SEARCH PROCEDURES.--Procedures established under this section shall provide, at a minimum, for the following:

(1) Notifying security personnel that a child is missing.

(2) Obtaining a detailed description of the child, including name, age, eye and hair color, height, weight, clothing, and shoes.

(3) Issuing a Code Adam alert and providing a description of the child, using a fast and effective means of communication.

(4) Establishing a central point of contact.

(5) Monitoring all points of egress from the building while a Code Adam alert is in effect.

(6) Conducting a thorough search of the building.

***667** (7) Contacting local law enforcement.

(8) Documenting the incident.

Subtitle E--Child Advocacy Center Grants

SEC. 381. INFORMATION AND DOCUMENTATION REQUIRED BY ATTORNEY GENERAL UNDER VICTIMS OF CHILD ABUSE ACT OF 1990.

(a) REGIONAL CHILDREN'S ADVOCACY CENTERS.--Section 213 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13001b) is amended--

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(1) in subsection (c)(4)--

<< 42 USCA § 13001b >>

(A) by striking "and" at the end of subparagraph (B)(ii);

<< 42 USCA § 13001b >>

(B) in subparagraph (B)(iii), by striking "Board" and inserting "board"; and

<< 42 USCA § 13001b >>

(C) by redesignating subparagraphs (C) and (D) as clauses (iv) and ([redacted]), respectively, of subparagraph (B), and by realigning such clauses so as to have the same indentation as the preceding clauses of subparagraph (B); and

(2) in subsection (e), by striking "Board" in each of paragraphs (1)(B)(ii), (2)(A), and (3), and inserting "board".

<< 42 USCA § 13004 >>

(b) AUTHORIZATION OF APPROPRIATIONS.--The text of section 214B of such Act (42 U.S.C. 13004) is amended to read as follows:

"(a) SECTIONS 213 AND 214.--There are authorized to be appropriated to carry out sections 213 and 214, $15,000,000 for each of fiscal years 2004 and 2005.

"(b) SECTION 214A.--There are authorized to be appropriated to carry out section 214A, $5,000,000 for each of fiscal years 2004 and 2005.".

TITLE IV--SENTENCING REFORM

SEC. 401. SENTENCING REFORM.

(a) ENFORCEMENT OF SENTENCING GUIDELINES FOR CHILD ABDUCTION AND SEX OFFENSES.--Section 3553(b) of title 18, United States Code is amended--

<< 18 USCA § 3553 >>

(1) by striking "The court" and inserting the following:

"(1) IN GENERAL.--Except as provided in paragraph (2), the court"; and

<< 18 USCA § 3553 >>

(2) by adding at the end the following:

"(2) CHILD CRIMES AND SEXUAL OFFENSES.--

"(A) SENTENCING.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

"(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

"(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

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***668** "(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

"(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

"(III) should result in a sentence different from that described; or

"(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.".

<< 28 USCA § 994 NOTE >>

(b) CONFORMING AMENDMENTS TO GUIDELINES MANUAL.--The Federal Sentencing Guidelines are amended--

(1) in section 5K2.0--

(A) by striking "Under" and inserting the following:

"(a) DOWNWARD DEPARTURES IN CRIMINAL CASES OTHER THAN CHILD CRIMES AND SEXUAL OFFENSES.--Under"; and

(B) by adding at the end the following:

"(b) DOWNWARD DEPARTURES IN CHILD CRIMES AND SEXUAL OFFENSES.--

"Under 18 U.S.C. § 3553(b)(2), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that--

"(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

"(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

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"(3) should result in a sentence different from that described.

***669** The grounds enumerated in this Part K of chapter 5 are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.".

(2) At the end of part K of chapter 5, add the following:

"§ 5K2.22 Specific Offender Characteristics as Grounds for Downward Departure in child crimes and sexual offenses (Policy Statement)

"In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, age may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.1.

"An extraordinary physical impairment may be a reason to impose a sentence below the applicable guideline range only if and to the extent permitted by § 5H1.4. Drug, alcohol, or gambling dependence or abuse is not a reason for imposing a sentence below the guidelines.

(3) Section 5K2.20 is amended by striking "A" and inserting "Except where a defendant is convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, a".

(4) Section 5H1.6 is amended by inserting after the first sentence the following: "In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code, family ties and responsibilities and community ties are not relevant in determining whether a sentence should be below the applicable guideline range.".

(5) Section 5K2.13 is amended by--

(A) striking "or" before "(3)"; and

(B) replacing "public" with "public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117 of title 18, United States Code.".

<< 18 USCA § 3553 >>

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.--Section 3553(c) of title 18, United States Code, is amended--

(1) by striking "described." and inserting "described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.";

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(2) by inserting ", together with the order of judgment and commitment," after "the court's statement of reasons"; and

***670** (3) by inserting "and to the Sentencing Commission," after "to the Probation System".

(d) REVIEW OF A SENTENCE.--

<< 18 USCA § 3742 >>

(1) REVIEW OF DEPARTURES.--Section 3742(e)(3) of title 18, United States Code, is amended to read as follows:

"(3) is outside the applicable guideline range, and

"(A) the district court failed to provide the written statement of reasons required by section 3553(c);

"(B) the sentence departs from the applicable guideline range based on a factor that--

"(i) does not advance the objectives set forth in section 3553(a)(2); or

"(ii) is not authorized under section 3553(b); or

"(iii) is not justified by the facts of the case; or

"(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or".

<< 42 USCA § 3742 >>

(2) STANDARD OF REVIEW.--The last paragraph of section 3742(e) of title 18, United States Code, is amended by striking "shall give due deference to the district court's application of the guidelines to the facts" and inserting ", except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts".

(3) DECISION AND DISPOSITION.--

<< 18 USCA § 3742 >>

(A) The first paragraph of section 3742(f) of title 18, United States Code, is amended by striking "the sen- tence";

<< 18 USCA § 3742 >>

(B) Section 3742(f)(1) of title 18, United States Code, is amended by inserting "the sentence" before "was imposed";

<< 18 USCA § 3742 >>

(C) Section 3742(f)(2) of title 18, United States Code, is amended to read as follows:

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"(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--

"(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

"(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);"; and

<< 18 USCA § 3742 >>

***671** (D) Section 3742(f)(3) of title 18, United States Code, is amended by inserting "the sentence" before "is not described".

<< 18 USCA § 3742 >>

(e) IMPOSITION OF SENTENCE UPON REMAND.--Section 3742 of title 18, United States Code, is amended by redesignating subsections (g) and (h) as subsections (h) and (i) and by inserting the following after subsection (f):

"(g) SENTENCING UPON REMAND.--A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that--

"(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

"(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

"(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

"(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.".

<< 18 USCA § 3742 >>

(f) DEFINITIONS.--Section 3742 of title 18, United States Code, as amended by subsection (e), is further amended by adding at the end the following:

"(j) DEFINITIONS.--For purposes of this section--

"(1) a factor is a 'permissible' ground of departure if it--

"(A) advances the objectives set forth in section 3553(a)(2); and

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"(B) is authorized under section 3553(b); and

"(C) is justified by the facts of the case; and

"(2) a factor is an 'impermissible' ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).".

<< 28 USCA § 994 NOTE >>

(g) REFORM OF GUIDELINES GOVERNING ACCEPTANCE OF RESPONSIBILITY.--Subject to subsection (j), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended--

(1) in section 3E1.1(b)--

(A) by inserting "upon motion of the government stating that" immediately before "the defendant has assisted authorities"; and

(B) by striking "taking one or more" and all that follows through and including "additional level" and insert "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level";

(2) in the Application Notes to the Commentary to section 3E1.1, by amending Application Note 6--

(A) by striking "one or both of"; and

***672** (B) by adding the following new sentence at the end: "Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing."; and

(3) in the Background to section 3E1.1, by striking "one or more of".

<< 28 USCA § 994 >>

(h) IMPROVED DATA COLLECTION.--Section 994(w) of title 28, United States Code, is amended to read as follows:

"(w)(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include--

"(A) the judgment and commitment order;

"(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

"(C) any plea agreement;

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"(D) the indictment or other charging document;

"(E) the presentence report; and

"(F) any other information as the Commission finds appropriate.

"(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all underlying records accompanying those reports described in this section, as well as other records received from courts.

"(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

"(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission may assemble or maintain in electronic form that include any information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.".

<< 28 USCA § 994 NOTE >>

(i) SENTENCING GUIDELINES AMENDMENTS.--(1) Subject to subsection (j), the Guidelines Manual promulgated by the Sentencing Commission pursuant to section 994(a) of title 28, United States Code, is amended as follows:

(A) Application Note 4(b)(i) to section 4B1.5 is amended to read as follows:

"(i) IN GENERAL.--For purposes of subsection (b), the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions, the defendant engaged in prohibited sexual conduct with a minor.".

(B) Section 2G2.4(b) is amended by adding at the end the following:

***673** "(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

"(5) If the offense involved--

"(A) at least 10 images, but fewer than 150, increase by 2 levels;

"(B) at least 150 images, but fewer than 300, increase by 3 levels;

"(C) at least 300 images, but fewer than 600, increase by 4 levels; and

"(D) 600 or more images, increase by 5 levels.".

(C) Section 2G2.2(b) is amended by adding at the end the following:

"(6) If the offense involved--

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"(A) at least 10 images, but fewer than 150, increase by 2 levels;

"(B) at least 150 images, but fewer than 300, increase by 3 levels;

"(C) at least 300 images, but fewer than 600, increase by 4 levels; and

"(D) 600 or more images, increase by 5 levels.".

<< 28 USCA § 994 NOTE >>

(2) The Sentencing Commission shall amend the Sentencing Guidelines to ensure that the Guidelines adequately reflect the seriousness of the offenses under sections 2243(b), 2244(a)(4), and 2244(b) of title 18, United States Code.

(j) CONFORMING AMENDMENTS.--

<< 28 USCA § 994 NOTE >>

(1) Upon enactment of this Act, the Sentencing Commission shall forthwith distribute to all courts of the United States and to the United States Probation System the amendments made by subsections (b), (g), and (i) of this section to the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. These amendments shall take effect upon the date of enactment of this Act, in accordance with paragraph (5).

<< 28 USCA § 994 NOTE >>

(2) On or before May 1, 2005, the Sentencing Commission shall not promulgate any amendment to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission that is inconsistent with any amendment made by subsection (b) or that adds any new grounds of downward departure to Part K of chapter 5.

<< 28 USCA § 994 NOTE >>

(3) With respect to cases covered by the amendments made by subsection (i) of this section, the Sentencing Commission may make further amendments to the sentencing guidelines, policy statements, or official commentary of the Sentencing Commission, except that the Commission shall not promulgate any amendments that, with respect to such cases, would result in sentencing ranges that are lower than those that would have applied under such subsection.

<< 28 USCA § 994 NOTE >>

(4) At no time may the Commission promulgate any amendment that would alter or repeal the amendments made by subsection (g) of this section.

(5) Section 3553(a) of title 18, United States Code, is amended--

<< 18 USCA § 3553 >>

(A) by amending paragraph (4)(A) to read as follows:

"(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

***674** "(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments

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have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or";

<< 18 USCA § 3553 >>

(B) in paragraph (4)(B), by inserting ", taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28)" after "Code";

<< 18 USCA § 3553 >>

(C) by amending paragraph (5) to read as follows:

"(5) any pertinent policy statement--

"(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

"(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.".

<< 28 USCA § 994 >>

(k) COMPLIANCE WITH STATUTE.--Section 994(a) of title 28, United States Code, is amended by striking "consistent with all pertinent provisions of this title and title 18, United States Code," and inserting "consistent with all pertinent provisions of any Federal statute".

<< 18 USCA § 3553 NOTE >>

(l) REPORT BY ATTORNEY GENERAL.--

(1) DEFINED TERM.--For purposes of this section, the term "report described in paragraph (3)" means a report, submitted by the Attorney General, which states in detail the policies and procedures that the Department of Justice has adopted subsequent to the enactment of this Act--

(A) to ensure that Department of Justice attorneys oppose sentencing adjustments, including downward departures, that are not supported by the facts and the law;

(B) to ensure that Department of Justice attorneys in such cases make a sufficient record so as to permit the possibility of an appeal;

(C) to delineate objective criteria, specified by the Attorney General, as to which such cases may warrant consideration of an appeal, either because of the nature or magnitude of the sentencing error, its prevalence in the district, or its prevalence with respect to a particular judge;

(D) to ensure that Department of Justice attorneys promptly notify the designated Department of Justice component in Washington concerning such adverse sentencing decisions; and

(E) to ensure the vigorous pursuit of appropriate and meritorious appeals of such adverse decisions.

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(2) REPORT REQUIRED.--

***675** (A) IN GENERAL.--Not later than 15 days after a district court's grant of a downward departure in any case, other than a case involving a downward departure for substantial assistance to authorities pursuant to section 5K1.1 of the United States Sentencing Guidelines, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate containing the information described under subparagraph (B).

(B) CONTENTS.--The report submitted pursuant to subparagraph (A) shall set forth--

(i) the case;

(ii) the facts involved;

(iii) the identity of the district court judge;

(iv) the district court's stated reasons, whether or not the court provided the United States with advance notice of its intention to depart; and

(v) the position of the parties with respect to the downward departure, whether or not the United States has filed, or intends to file, a motion for reconsideration.

(C) APPEAL OF THE DEPARTURE.--Not later than 5 days after a decision by the Solicitor General regarding the authorization of an appeal of the departure, the Attorney General shall submit a report to the Committees on the Judiciary of the House of Representatives and the Senate that describes the decision of the Solicitor General and the basis for such decision.

(3) EFFECTIVE DATE.--Paragraph (2) shall take effect on the day that is 91 days after the date of enactment of this Act, except that such paragraph shall not take effect if not more than 90 days after the date of enactment of this Act the Attorney General has submitted to the Judiciary Committees of the House of Representatives and the Senate the report described in paragraph (3).

<< 28 USCA § 994 NOTE >>

(m) REFORM OF EXISTING PERMISSIBLE GROUNDS OF DOWNWARD DEPARTURES.--Not later than 180 days after the enactment of this Act, the United States Sentencing Commission shall--

(1) review the grounds of downward departure that are authorized by the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission; and

(2) promulgate, pursuant to section 994 of title 28, United States Code--

(A) appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced;

(B) a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United States Attorney; and

(C) any other conforming amendments to the sentencing guidelines, policy statements, and official comment-

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ary of the Sentencing Commission necessitated by this Act, including a revision of paragraph 4(b) of part A of chapter 1 and a revision of section 5K2.0.

(n) COMPOSITION OF SENTENCING COMMISSION.--

<< 28 USCA § 991 >>

***676** (1) IN GENERAL.--Section 991(a) of title 28, United States Code, is amended by striking "At least three" and inserting "Not more than 3".

<< 28 USCA § 991 NOTE >>

(2) APPLICABILITY.--The amendment made under paragraph (1) shall not apply to any person who is serving, or who has been nominated to serve, as a member of the Sentencing Commission on the date of enactment of this Act.

TITLE [redacted]--OBSCENITY AND PORNOGRAPHY
Subtitle A--Child Obscenity and Pornography Prevention
<< 18 USCA § 2251 NOTE >>

SEC. 501. FINDINGS.

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under [redacted]. California, 413 U.S. 15 (1973) (obscenity), or New York [redacted]. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," New York [redacted]. Ferber, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne [redacted]. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Ferber, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to:

(A) computer generate depictions of children that are indistinguishable from depictions of real children;

(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or

(C) disguise pictures of real children being abused by making the image look computer-generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not

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already, to computer generate realistic images of children.

***677** (6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such challenges increased significantly after the decision in Ashcroft [redacted]. Free Speech Coalition, 535 U.S. 234 (2002).

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact of the Free Speech Coalition decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful. In addition, the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before.

(11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is--and for the foreseeable future will remain-- prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real ***678** children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

(12) Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.

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(13) In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child--as some courts have done--threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

(14) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(15) The Supreme Court's 1982 Ferber [redacted] New York decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.

SEC. 502. IMPROVEMENTS TO PROHIBITION ON VIRTUAL CHILD PORNOGRAPHY.

(a) Section 2256(8) of title 18, United States Code, is amended--

<< 18 USCA § 2256 >>

(1) so that subparagraph (B) reads as follows:

"(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or":

<< 18 USCA § 2256 >>

(2) by striking "; or" at the end of subparagraph (C) and inserting a period; and

<< 18 USCA § 2256 >>

(3) by striking subparagraph (D).

<< 18 USCA § 2256 >>

(b) Section 2256(2) of title 18, United States Code, is amended to read as follows:

"(2)(A) Except as provided in subparagraph (B), 'sexually explicit conduct' means actual or simulated--

***679** "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

"(ii) bestiality;

"(iii) masturbation;

"(iv) sadistic or masochistic abuse; or

"([redacted]) lascivious exhibition of the genitals or pubic area of any person;

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"(B) For purposes of subsection 8(B) of this section, 'sexually explicit conduct' means--

"(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

"(ii) graphic or lascivious simulated;

"(I) bestiality;

"(II) masturbation; or

"(III) sadistic or masochistic abuse; or

"(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;".

<< 18 USCA § 2256 >>

(c) Section 2256 is amended by inserting at the end the following new paragraphs:

"(10) 'graphic', when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

"(11) the term 'indistinguishable' used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.".

<< 18 USCA § 2252A >>

(d) Section 2252A(c) of title 18, United States Code, is amended to read as follows:

"(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that--

"(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

"(B) each such person was an adult at the time the material was produced; or

"(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply ***680** with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such de-

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fense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.".

SEC. 503. CERTAIN ACTIVITIES RELATING TO MATERIAL CONSTITUTING OR CONTAINING CHILD PORNOGRAPHY.

Section 2252A of title 18, United States Code, is amended--

<< 18 USCA § 2252A >>

(1) in subsection (a)--

(A) by striking paragraph (3) and inserting the following:

"(3) knowingly--

"(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

"(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

"(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

"(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;";

<< 18 USCA § 2252A >>

(B) in paragraph (4), by striking "or" at the end;

<< 18 USCA § 2252A >>

(C) in paragraph (5), by striking the comma at the end and inserting "; or"; and

<< 18 USCA § 2252A >>

(D) by adding after paragraph (5) the following:

"(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct--

"(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

"(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

"(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

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for purposes of inducing or persuading a minor to participate in any activity that is illegal."; and

<< 18 USCA § 2252A >>

(2) in subsection (b)(1), by striking "paragraphs (1), (2), (3), or (4)" and inserting "paragraph (1), (2), (3), (4), or (6)".

SEC. 504. OBSCENE CHILD PORNOGRAPHY.

<< 18 USCA § 1466A >>

(a) IN GENERAL.--Chapter 71 of title 18, United States Code, is amended by inserting after section 1466 the following:

***681** "§ 1466A. Obscene visual representations of the sexual abuse of children

"(a) IN GENERAL.--Any person who, in a circumstance described in subsection (d), knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that--

"(1)(A) depicts a minor engaging in sexually explicit conduct; and

"(B) is obscene; or

"(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

"(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(1), including the penalties provided for cases involving a prior conviction.

"(b) ADDITIONAL OFFENSES.--Any person who, in a circumstance described in subsection (d), knowingly possesses a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that--

"(1)(A) depicts a minor engaging in sexually explicit conduct; and

"(B) is obscene; or

"(2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; and

"(B) lacks serious literary, artistic, political, or scientific value;

or attempts or conspires to do so, shall be subject to the penalties provided in section 2252A(b)(2), including the penalties provided for cases involving a prior conviction.

"(c) NONREQUIRED ELEMENT OF OFFENSE.--It is not a required element of any offense under this section that the minor depicted actually exist.

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"(d) CIRCUMSTANCES.--The circumstance referred to in subsections (a) and (b) is that--

"(1) any communication involved in or made in furtherance of the offense is communicated or transported by the mail, or in interstate or foreign commerce by any means, including by computer, or any means or instrumentality of interstate or foreign commerce is otherwise used in committing or in furtherance of the commission of the offense;

"(2) any communication involved in or made in furtherance of the offense contemplates the transmission or transportation of a visual depiction by the mail, or in interstate or foreign commerce by any means, including by computer;

"(3) any person travels or is transported in interstate or foreign commerce in the course of the commission or in furtherance of the commission of the offense;

"(4) any visual depiction involved in the offense has been mailed, or has been shipped or transported in interstate or foreign commerce by any means, including by computer, or ***682** was produced using materials that have been mailed, or that have been shipped or transported in interstate or foreign commerce by any means, including by computer; or

"(5) the offense is committed in the special maritime and territorial jurisdiction of the United States or in any territory or possession of the United States.

"(e) AFFIRMATIVE DEFENSE.--It shall be an affirmative defense to a charge of violating subsection (b) that the defendant--

"(1) possessed less than 3 such visual depictions; and

"(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any such visual depiction--

"(A) took reasonable steps to destroy each such visual depiction; or

"(B) reported the matter to a law enforcement agency and afforded that agency access to each such visual depiction.

"(f) DEFINITIONS.--For purposes of this section--

"(1) the term 'visual depiction' includes undeveloped film and videotape, and data stored on a computer disk or by electronic means which is capable of conversion into a visual image, and also includes any photograph, film, video, picture, digital image or picture, computer image or picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means;

"(2) the term 'sexually explicit conduct' has the meaning given the term in section 2256(2)(A) or 2256(2)(B); and

"(3) the term 'graphic', when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted.".

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<< 18 USCA prec. § 1460 >>

(b) TECHNICAL AND CONFORMING AMENDMENT.--The table of sections at the beginning of such chapter is amended by inserting after the item relating to section 1466 the following new item:

"1466A. Obscene visual representations of the sexual abuse of children.".

<< 18 USCA § 1466A NOTE >>

(c) SENTENCING GUIDELINES.--

(1) CATEGORY.--Except as provided in paragraph (2), the applicable category of offense to be used in determining the sentencing range referred to in section 3553(a)(4) of title 18, United States Code, with respect to any person convicted under section 1466A of such title, shall be the category of offenses described in section 2G2.2 of the Sentencing Guidelines.

<< 28 USCA § 994 NOTE >>

(2) RANGES.--The Sentencing Commission may promulgate guidelines specifically governing offenses under section 1466A of title 18, United States Code, if such guidelines do not result in sentencing ranges that are lower than those that would have applied under paragraph (1).

<< 18 USCA § 2252A >>

SEC. 505. ADMISSIBILITY OF EVIDENCE.

Section 2252A of title 18, United States Code, is amended by adding at the end the following:

"(e) ADMISSIBILITY OF EVIDENCE.--On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any ***683** child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.".

SEC. 506. EXTRATERRITORIAL PRODUCTION OF CHILD PORNOGRAPHY FOR DISTRIBUTION IN THE UNITED STATES.

Section 2251 of title 18, United States Code, is amended--

<< 18 USCA § 2251 >>

(1) by striking "subsection (d)" each place that term appears and inserting "subsection (e)";

<< 18 USCA § 2251 >>

(2) by redesignating subsections (c) and (d) as subsections (d) and (e), respectively; and

<< 18 USCA § 2251 >>

(3) by inserting after subsection (b) the following:

"(c)(1) Any person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any

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visual depiction of such conduct, shall be punished as provided under subsection (e).

"(2) The circumstance referred to in paragraph (1) is that--

"(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by computer or mail; or

"(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by computer or mail.".

<< 18 USCA §§ 2251, 2252, 2252A >>

SEC. 507. STRENGTHENING ENHANCED PENALTIES FOR REPEAT OFFENDERS.

Sections 2251(e) (as redesignated by section 506(2)), 2252(b), and 2252A(b) of title 18, United States Code, are each amended--

(1) by inserting "chapter 71," immediately before each occurrence of "chapter 109A,"; and

(2) by inserting "or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice)," immediately before each occurrence of "or under the laws".

SEC. 508. SERVICE PROVIDER REPORTING OF CHILD PORNOGRAPHY AND RELATED INFORMATION.

(a) Section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032) is amended--

<< 42 USCA § 13032 >>

(1) in subsection (b)(1)--

(A) by inserting "2252B," after "2252A,"; and

(B) by inserting "or a violation of section 1466A of that title," after "of that title),";

<< 42 USCA § 13032 >>

(2) in subsection (c), by inserting "or pursuant to" after "to comply with";

<< 42 USCA § 13032 >>

(3) by amending subsection (f)(1)(D) to read as follows:

"(D) where the report discloses a violation of State criminal law, to an appropriate official of a State or subdivision of a State for the purpose of enforcing such State law.";

<< 42 USCA § 13032 >>

(4) by redesignating paragraph (3) of subsection (b) as paragraph (4); and

<< 42 USCA § 13032 >>

(5) by inserting after paragraph (2) of subsection (b) the following new paragraph:

***684** "(3) In addition to forwarding such reports to those agencies designated in subsection (b)(2), the National

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Center for Missing and Exploited Children is authorized to forward any such report to an appropriate official of a state or subdivision of a state for the purpose of enforcing state criminal law.".

(b) Section 2702 of title 18, United States Code, is amended--

(1) in subsection (b)--

<< 18 USCA § 2702 >>

(A) in paragraph (6), by striking subparagraph (B);

<< 18 USCA § 2702 >>

(B) by redesignating paragraphs (6) and (7) as paragraphs (7) and (8) respectively;

<< 18 USCA § 2702 >>

(C) by striking "or" at the end of paragraph (5); and

(D) by inserting after paragraph (5) the following new paragraph:

"(6) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032);"; and

(2) in subsection (c)--

<< 18 USCA § 2702 >>

(A) by striking "or" at the end of paragraph (4);

<< 18 USCA § 2702 >>

(B) by redesignating paragraph (5) as paragraph (6); and

<< 18 USCA § 2702 >>

(C) by adding after paragraph (4) the following new paragraph:

"(5) to the National Center for Missing and Exploited Children, in connection with a report submitted thereto under section 227 of the Victims of Child Abuse Act of 1990 (42 U.S.C. 13032); or".

<< 18 USCA § 3486 >>

SEC. 509. INVESTIGATIVE AUTHORITY RELATING TO CHILD PORNOGRAPHY.

Section 3486(a)(1)(C)(i) of title 18, United States Code, is amended by striking "the name, address" and all that follows through "subscriber or customer utilized" and inserting "the information specified in section 2703(c)(2)".

<< 18 USCA § 2252A >>

SEC. 510. CIVIL REMEDIES.

Section 2252A of title 18, United States Code, as amended by this Act, is amended by adding at the end the following:

"(f) CIVIL REMEDIES.--

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"(1) IN GENERAL.--Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

"(2) RELIEF.--In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including--

"(A) temporary, preliminary, or permanent injunctive relief;

"(B) compensatory and punitive damages; and

"(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.".

SEC. 511. RECORDKEEPING REQUIREMENTS.

(a) IN GENERAL.--Section 2257 of title 18, United States Code, is amended--

<< 18 USCA § 2257 >>

(1) in subsection (d)(2), by striking "of this section" and inserting "of this chapter or chapter 71,";

<< 18 USCA § 2257 >>

***685** (2) in subsection (h)(3), by inserting ", computer generated image, digital image, or picture," after "video tape"; and

<< 18 USCA § 2257 >>

(3) in subsection (i)--

(A) by striking "not more than 2 years" and inserting "not more than 5 years"; and

(B) by striking "5 years" and inserting "10 years".

<< 18 USCA § 2257 NOTE >>

(b) REPORT.--Not later than 1 year after enactment of this Act, the Attorney General shall submit to Congress a report detailing the number of times since January 1993 that the Department of Justice has inspected the records of any producer of materials regulated pursuant to section 2257 of title 18, United States Code, and section 75 of title 28 of the Code of Federal Regulations. The Attorney General shall indicate the number of violations prosecuted as a result of those inspections.

<< 28 USCA § 994 NOTE >>

SEC. 512. SENTENCING ENHANCEMENTS FOR INTERSTATE TRAVEL TO ENGAGE IN SEXUAL ACT WITH A JUVENILE.

Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that guideline penalties are adequate in cases that involve interstate travel with the intent to engage in a sexual act with a juvenile in violation of section 2423 of title 18, United States Code, to deter and punish such conduct.

SEC. 513. MISCELLANEOUS PROVISIONS.

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(a) APPOINTMENT OF TRIAL ATTORNEYS.--

(1) IN GENERAL.--Not later than 6 months after the date of enactment of this Act, the Attorney General shall appoint 25 additional trial attorneys to the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice or to appropriate United States Attorney's Offices, and those trial attorneys shall have as their primary focus, the investigation and prosecution of Federal child pornography and obscenity laws.

(2) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated to the Department of Justice such sums as may be necessary to carry out this subsection.

<< 18 USCA § 1466A NOTE >>

(b) REPORT TO CONGRESSIONAL COMMITTEES.--

(1) IN GENERAL.--Not later than 9 months after the date of enactment of this Act, and every 2 years thereafter, the Attorney General shall report to the Chairpersons and Ranking Members of the Committees on the Judiciary of the Senate and the House of Representatives on the Federal enforcement actions under chapter 110 or section 1466A of title 18, United States Code.

(2) CONTENTS.--The report required under paragraph (1) shall include--

(A) an evaluation of the prosecutions brought under chapter 110 or section 1466A of title 18, United States Code;

(B) an outcome-based measurement of performance; and

(C) an analysis of the technology being used by the child pornography industry.

<< 28 USCA § 994 NOTE >>

(c) SENTENCING GUIDELINES.--Pursuant to its authority under section 994(p) of title 28, United States Code, and in accordance ***686** with this section, the United States Sentencing Commission shall review and, as appropriate, amend the Federal Sentencing Guidelines and policy statements to ensure that the guidelines are adequate to deter and punish conduct that involves a violation of paragraph (3)(B) or (6) of section 2252A(a) of title 18, United States Code, as created by this Act. With respect to the guidelines for section 2252A(a)(3)(B), the Commission shall consider the relative culpability of promoting, presenting, describing, or distributing material in violation of that section as compared with solicitation of such material.

Subtitle B--Truth in Domain Names

SEC. 521. MISLEADING DOMAIN NAMES ON THE INTERNET.

<< 18 USCA § 2252B >>

(a) IN GENERAL.--Chapter 110 of title 18, United States Code, is amended by inserting after section 2252A the following:

"§ 2252B. Misleading domain names on the Internet

"(a) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a person into viewing material constituting obscenity shall be fined under this title or imprisoned not more than 2 years, or both.

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"(b) Whoever knowingly uses a misleading domain name on the Internet with the intent to deceive a minor into viewing material that is harmful to minors on the Internet shall be fined under this title or imprisoned not more than 4 years, or both.

"(c) For the purposes of this section, a domain name that includes a word or words to indicate the sexual content of the site, such as 'sex' or 'porn', is not misleading.

"(d) For the purposes of this section, the term 'material that is harmful to minors' means any communication, consisting of nudity, sex, or excretion, that, taken as a whole and with reference to its context--

"(1) predominantly appeals to a prurient interest of minors;

"(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

"(3) lacks serious literary, artistic, political, or scientific value for minors.

"(e) For the purposes of subsection (d), the term 'sex' means acts of masturbation, sexual intercourse, or physcial contact with a person's genitals, or the condition of human male or female genitals when in a state of sexual stimulation or arousal.".

<< 18 USCA prec. § 2251 >>

(b) CLERICAL AMENDMENT.--The table of sections at the beginning of chapter 110 of title 18, United States Code, is amended by inserting after the item relating to section 2252A the following new item:

"2252B. Misleading domain names on the Internet.".

TITLE VI--MISCELLANEOUS PROVISIONS

SEC. 601. PENALTIES FOR USE OF MINORS IN CRIMES OF VIOLENCE.

<< 18 USCA § 25 >>

Chapter 1 of title 18, United States Code, is amended by adding at the end the following:

***687** "§ 25. Use of minors in crimes of violence

"(a) DEFINITIONS.--In this section, the following definitions shall apply:

"(1) CRIME OF VIOLENCE.--The term 'crime of violence' has the meaning set forth in section 16.

"(2) MINOR.--The term 'minor' means a person who has not reached 18 years of age.

"(3) USES.--The term 'uses' means employs, hires, persuades, induces, entices, or coerces.

"(b) PENALTIES.--Any person who is 18 years of age or older, who intentionally uses a minor to commit a crime of violence for which such person may be prosecuted in a court of the United States, or to assist in avoiding detection or apprehension for such an offense, shall--

"(1) for the first conviction, be subject to twice the maximum term of imprisonment and twice the maximum fine that would otherwise be authorized for the offense; and

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"(2) for each subsequent conviction, be subject to 3 times the maximum term of imprisonment and 3 times the maximum fine that would otherwise be authorized for the offense.".

<< 18 USCA prec. § 1 >>

(b) CLERICAL AMENDMENT.--The table of sections at the beginning of chapter 1 of title 18, United States Code, is amended by adding at the end the following:

"25. Use of minors in crimes of violence.".

SEC. 602. SENSE OF CONGRESS.

(a) FOCUS OF INVESTIGATION AND PROSECUTION.--It is the sense of Congress that the Child Exploitation and Obscenity Section of the Criminal Division of the Department of Justice should focus its investigative and prosecutorial efforts on major producers, distributors, and sellers of obscene material and child pornography that use misleading methods to market their material to children.

(b) VOLUNTARY LIMITATION ON WEBSITE FRONT PAGES.--It is the sense of Congress that the online commercial adult entertainment industry should voluntarily refrain from placing obscenity, child pornography, or material that is harmful to minors on the front pages of their websites to protect juveniles from material that may negatively impact their social, moral, and psychological development.

SEC. 603. COMMUNICATIONS DECENCY ACT OF 1996.

Section 223 of the Communications Act of 1934 (47 U.S.C. 223) is amended--

(1) in subsection (a)(1)--

<< 47 USCA § 223 >>

(A) in subparagraph (A), by striking ", lewd, lascivious, filthy, or indecent" and inserting "or child pornography"; and

<< 47 USCA § 223 >>

(B) in subparagraph (B), by striking "indecent" and inserting "child pornography"; and

<< 47 USCA § 223 >>

(2) in subsection (d)(1), by striking ", in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" and inserting "is obscene or child pornography".

***688** SEC. 604. INTERNET AVAILABILITY OF INFORMATION CONCERNING REGISTERED SEX OFFENDERS.

<< 42 USCA § 14071 >>

(a) IN GENERAL.--Section 170101(e)(2) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(e)(2)) is amended by adding at the end the following: "The release of information under this paragraph shall include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous.".

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<< 42 USCA § 14071 NOTE >>

(b) COMPLIANCE DATE.--Each State shall implement the amendment made by this section within 3 years after the date of enactment of this Act, except that the Attorney General may grant an additional 2 years to a State that is making a good faith effort to implement the amendment made by this section.

<< 42 USCA § 14071 NOTE >>

(c) NATIONAL INTERNET SITE.--The Crimes Against Children Section of the Criminal Division of the Department of Justice shall create a national Internet site that links all State Internet sites established pursuant to this section.

SEC. 605. REGISTRATION OF CHILD PORNOGRAPHERS IN THE NATIONAL SEX OFFENDER REGISTRY.

(a) JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION PROGRAM.--Section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071) is amended--

<< 42 USCA § 14071 >>

(1) by striking the section heading and inserting the following:

"SEC. 170101. JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION PROGRAM.";

and

(2) in subsection (a)(3)--

<< 42 USCA § 14071 >>

(A) in clause (vii), by striking "or" at the end;

<< 42 USCA § 14071 >>

(B) by redesignating clause (viii) as clause (ix); and

<< 42 USCA § 14071 >>

(C) by inserting after clause (vii) the following:

"(viii) production or distribution of child pornography, as described in section 2251, 2252, or 2252A of title 18, United States Code; or".

(b) AUTHORIZATION OF APPROPRIATIONS.--There are authorized to be appropriated to the Department of Justice, for each of fiscal years 2004 through 2007, such sums as may be necessary to carry out the amendments made by this section.

<< 42 USCA § 14071 >>

SEC. 606. GRANTS TO STATES FOR COSTS OF COMPLIANCE WITH NEW SEX OFFENDER REGISTRY REQUIREMENTS.

Section 170101(i)(3) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(i)(3) is

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amended to read as follows:

"(3) AUTHORIZATION OF APPROPRIATIONS.--There is authorized to be appropriated for each of the fiscal years 2004 through 2007 such sums as may be necessary to carry out the provisions of section 1701(d)(10) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796dd(d)(10)), as added by the PROTECT Act.".

***689** SEC. 607. SAFE ID ACT.

<< 18 USCA § 1001 NOTE >>

(a) SHORT TITLE.--This section may be cited as the "Secure Authentication Feature and Enhanced Identification Defense Act of 2003" or "SAFE ID Act".

(b) FRAUD AND FALSE STATEMENTS.--

(1) OFFENSES.--Section 1028(a) of title 18, United States Code, is amended--

<< 18 USCA § 1028 >>

(A) in paragraph (1), by inserting ", authentication feature," after "an identification document";

<< 18 USCA § 1028 >>

(B) in paragraph (2)--

(i) by inserting ", authentication feature," after "an identification document"; and

(ii) by inserting "or feature" after "such document";

<< 18 USCA § 1028 >>

(C) in paragraph (3), by inserting ", authentication features," after "possessor)";

<< 18 USCA § 1028 >>

(D) in paragraph (4)--

(i) by inserting ", authentication feature," after "possessor)"; and

(ii) by inserting "or feature" after "such document";

<< 18 USCA § 1028 >>

(E) in paragraph (5), by inserting "or authentication feature" after "implement" each place that term appears;

<< 18 USCA § 1028 >>

(F) in paragraph (6)--

(i) by inserting "or authentication feature" before "that is or appears";

(ii) by inserting "or authentication feature" before "of the United States";

(iii) by inserting "or feature" after "such document"; and

(iv) by striking "or" at the end;

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<< 18 USCA § 1028 >>
(G) in paragraph (7), by inserting "or" after the semicolon; and

<< 18 USCA § 1028 >>
(H) by inserting after paragraph (7) the following:

"(8) knowingly traffics in false authentication features for use in false identification documents, document-making implements, or means of identification;".

(2) PENALTIES.--Section 1028(b) of title 18, United States Code, is amended--

(A) in paragraph (1)--

(i) in subparagraph (A)--

<< 18 USCA § 1028 >>
(I) by inserting ", authentication feature," before "or false"; and

<< 18 USCA § 1028 >>
(II) in clause (i), by inserting "or authentication feature" after "document"; and

<< 18 USCA § 1028 >>
(ii) in subparagraph (B), by inserting ", authentication features," before "or false"; and

<< 18 USCA § 1028 >>
(B) in paragraph (2)(A), by inserting ", authentication feature," before "or a false".

<< 18 USCA § 1028 >>
(3) CIRCUMSTANCES.--Section 1028(c)(1) of title 18, United States Code, is amended by inserting ", authentication feature," before "or false" each place that term appears.

(4) DEFINITIONS.--Section 1028(d) of title 18, United States Code, is amended--

<< 18 USCA § 1028 >>
(A) by redesignating paragraphs (1), (2), (3), (4), (5), (6), (7), and (8) as paragraphs (2), (3), (4), (7), (8), (9), (10), and (11), respectively;

<< 18 USCA § 1028 >>
(B) by inserting before paragraph (2), as redesignated, the following:

***690** "(1) the term 'authentication feature' means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification to determine if the document is counterfeit, altered, or otherwise falsified;";

<< 18 USCA § 1028 >>
(C) in paragraph (4)(A), as redesignated, by inserting "or was issued under the authority of a governmental entity but was subsequently altered for purposes of deceit" after "entity";

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<< 18 USCA § 1028 >>

(D) by inserting after paragraph (4), as redesignated, the following:

"(5) the term 'false authentication feature' means an authentication feature that--

"(A) is genuine in origin, but, without the authorization of the issuing authority, has been tampered with or altered for purposes of deceit;

"(B) is genuine, but has been distributed, or is intended for distribution, without the authorization of the issuing authority and not in connection with a lawfully made identification document, document-making implement, or means of identification to which such authentication feature is intended to be affixed or embedded by the respective issuing authority; or

"(C) appears to be genuine, but is not;

"(6) the term 'issuing authority'--

"(A) means any governmental entity or agency that is authorized to issue identification documents, means of identification, or authentication features; and

"(B) includes the United States Government, a State, a political subdivision of a State, a foreign government, a political subdivision of a foreign government, or an international government or quasi-governmental organization;";

<< 18 USCA § 1028 >>

(E) in paragraph (10), as redesignated, by striking "and" at the end;

<< 18 USCA § 1028 >>

(F) in paragraph (11), as redesignated, by striking the period at the end and inserting "; and"; and

<< 18 USCA § 1028 >>

(G) by adding at the end the following:

"(12) the term 'traffic' means--

"(A) to transport, transfer, or otherwise dispose of, to another, as consideration for anything of value; or

"(B) to make or obtain control of with intent to so transport, transfer, or otherwise dispose of.".

(5) ADDITIONAL PENALTIES.--Section 1028 of title 18, United States Code, is amended--

<< 18 USCA § 1028 >>

(A) by redesignating subsection (h) as subsection (i); and

<< 18 USCA § 1028 >>

(B) by inserting after subsection (g) the following:

"(h) FORFEITURE; DISPOSITION.--In the circumstance in which any person is convicted of a violation of subsection (a), the court shall order, in addition to the penalty prescribed, the forfeiture and destruction or other

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disposition of all illicit authentication features, identification documents, document-making implements, or means of identification.".

<< 18 USCA § 1028 >>

(6) TECHNICAL AND CONFORMING AMENDMENT.--Section 1028 of title 18, United States Code, is amended in the heading ***691** by inserting ", **AUTHENTICATION** FEATURES," **after** "DOCUMENTS".

SEC. 608. ILLICIT DRUG ANTI-PROLIFERATION ACT.

<< 21 USCA § 801 NOTE >>

(a) SHORT TITLE.--This section may be cited as the "Illicit Drug Anti-Proliferation Act of 2003".

(b) OFFENSES.--

(1) IN GENERAL.--Section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)) is amended--

<< 21 USCA § 856 >>

(A) in paragraph (1), by striking "open or maintain any place" and inserting "open, lease, rent, use, or maintain any place, whether permanently or temporarily,"; and

<< 21 USCA § 856 >>

(B) by striking paragraph (2) and inserting the following:

"(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.".

<< 21 USCA § 856 >>

(2) TECHNICAL AMENDMENT.--The heading to section 416 of the Controlled Substances Act (21 U.S.C. 856) is amended to read as follows:

"SEC. 416. MAINTAINING DRUG-INVOLVED PREMISES.".

(3) CONFORMING AMENDMENT.--The table of contents to title II of the Comprehensive Drug Abuse and Prevention Act of 1970 is amended by striking the item relating to section 416 and inserting the following:

"Sec. 416. Maintaining drug-involved premises.".

<< 21 USCA § 856 >>

(c) CIVIL PENALTY AND EQUITABLE RELIEF FOR MAINTAINING DRUG-INVOLVED PREMISES.--Section 416 of the Controlled Substances Act (21 U.S.C. 856) is amended by adding at the end the following:

"(d)(1) Any person who violates subsection (a) shall be subject to a civil penalty of not more than the greater of- -

"(A) $250,000; or

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"(B) 2 times the gross receipts, either known or estimated, that were derived from each violation that is attributable to the person.

"(2) If a civil penalty is calculated under paragraph (1)(B), and there is more than 1 defendant, the court may apportion the penalty between multiple violators, but each violator shall be jointly and severally liable for the civil penalty under this subsection.

"(e) Any person who violates subsection (a) shall be subject to declaratory and injunctive remedies as set forth in section 403(f).".

<< 21 USCA § 843 >>
<< 21 USCA § 843 >>
(d) DECLARATORY AND INJUNCTIVE REMEDIES.--Section 403(f)(1) of the Controlled Substances Act (21 U.S.C. 843(f)(1)) is amended by striking "this section or section 402" and inserting "this section, section 402, or 416".

<< 28 USCA § 994 NOTE >>
(e) SENTENCING COMMISSION GUIDELINES.--The United States Sentencing Commission shall--

(1) review the Federal sentencing guidelines with respect to offenses involving gamma hydroxybutyric acid (GHB);

***692** (2) consider amending the Federal sentencing guidelines to provide for increased penalties such that those penalties reflect the seriousness of offenses involving GHB and the need to deter them; and

(3) take any other action the Commission considers necessary to carry out this section.

(f) AUTHORIZATION OF APPROPRIATIONS FOR A DEMAND REDUCTION COORDINATOR.--There is authorized to be appropriated $5,900,000 to the Drug Enforcement Administration of the Department of Justice for the hiring of a special agent in each State to serve as a Demand Reduction Coordinator.

(g) AUTHORIZATION OF APPROPRIATIONS FOR DRUG EDUCATION.--There is authorized to be appropriated such sums as necessary to the Drug Enforcement Administration of the Department of Justice to educate youth, parents, and other interested adults about club drugs.

SEC. 609. DEFINITION OF VEHICLE.

Section 1993(c) of title 18, United States Code, is amended--

<< 18 USCA § 1993 >>
(1) in paragraph (7), by striking "and" at the end;

<< 18 USCA § 1993 >>
(2) in paragraph (8), by striking the period at the end and inserting "; and"; and

<< 18 USCA § 1993 >>
(3) by adding at the end the following:

"(9) the term 'vehicle' means any carriage or other contrivance used, or capable of being used, as a means of

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transportation on land, water, or through the air.".

SEC. 610. AUTHORIZATION OF JOHN DOE DNA INDICTMENTS.

(a) LIMITATION.--Section 3282 of title 18, United States Code, is amended--

<< 18 USCA § 3282 >>

(1) by striking "Except" and inserting the following:

"(a) IN GENERAL.--Except"; and

<< 18 USCA § 3282 >>

(2) by adding at the end the following:

"(b) DNA PROFILE INDICTMENT.--

"(1) IN GENERAL.--In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.

"(2) EXCEPTION.--Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to--

"(A) the limitations period described under subsection (a); and

"(B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

"(3) DEFINED TERM.--For purposes of this subsection, the term 'DNA profile' means a set of DNA identification characteristics.".

<< FRCRP Rule 7 >>

(b) RULES OF CRIMINAL PROCEDURE.--Rule 7(c)(1) of the Federal Rules of Criminal Procedure is amended by adding at the end the following: "For purposes of an indictment referred to in section 3282 of title 18, United States Code, for which the identity of the defendant is unknown, it shall be sufficient for the indictment to describe the defendant as an individual whose name is unknown, but who has a particular DNA profile, as that term is defined in that section 3282.".

***693** SEC. 611. TRANSITIONAL HOUSING ASSISTANCE GRANTS FOR CHILD VICTIMS OF DOMESTIC VIOLENCE, STALKING, OR SEXUAL ASSAULT.

Subtitle B of the Violence Against Women Act of 1994 (42 U.S.C. 13701 note; 108 Stat. 1925) is amended by adding at the end the following:

"CHAPTER 11--TRANSITIONAL HOUSING ASSISTANCE GRANTS FOR CHILD VICTIMS OF DOMESTIC VIOLENCE, STALKING, OR SEXUAL ASSAULT

<< 42 USCA § 13975 >>

"SEC. 40299. TRANSITIONAL HOUSING ASSISTANCE GRANTS FOR CHILD VICTIMS OF DOMESTIC VIOLENCE, STALKING, OR SEXUAL ASSAULT.

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"(a) IN GENERAL.--The Attorney General, acting in consultation with the Director of the Violence Against Women Office of the Department of Justice, shall award grants under this section to States, units of local government, Indian tribes, and other organizations (referred to in this section as the 'recipient') to carry out programs to provide assistance to minors, adults, and their dependents--

"(1) who are homeless, or in need of transitional housing or other housing assistance, as a result of fleeing a situation of domestic violence; and

"(2) for whom emergency shelter services or other crisis intervention services are unavailable or insufficient.

"(b) GRANTS.--Grants awarded under this section may be used for programs that provide--

"(1) short-term housing assistance, including rental or utilities payments assistance and assistance with related expenses such as payment of security deposits and other costs incidental to relocation to transitional housing for persons described in subsection (a); and

"(2) support services designed to enable a minor, an adult, or a dependent of such minor or adult, who is fleeing a situation of domestic violence to--

"(A) locate and secure permanent housing; and

"(B) integrate into a community by providing that minor, adult, or dependent with services, such as transportation, counseling, child care services, case management, employment counseling, and other assistance.

"(c) DURATION.--

"(1) IN GENERAL.--Except as provided in paragraph (2), a minor, an adult, or a dependent, who receives assistance under this section shall receive that assistance for not more than 18 months.

"(2) WAIVER.--The recipient of a grant under this section may waive the restriction under paragraph (1) for not more than an additional 6 month period with respect to any minor, adult, or dependent, who--

"(A) has made a good-faith effort to acquire permanent housing; and

"(B) has been unable to acquire permanent housing.

"(d) APPLICATION.--

"(1) IN GENERAL.--Each eligible entity desiring a grant under this section shall submit an application to the Attorney General at such time, in such manner, and accompanied by ***694** such information as the Attorney General may reasonably require.

"(2) CONTENTS.--Each application submitted pursuant to paragraph (1) shall--

"(A) describe the activities for which assistance under this section is sought; and

"(B) provide such additional assurances as the Attorney General determines to be essential to ensure compliance with the requirements of this section.

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"(3) APPLICATION.--Nothing in this subsection shall be construed to require--

"(A) victims to participate in the criminal justice system in order to receive services; or

"(B) domestic violence advocates to breach client confidentiality.

"(e) REPORT TO THE ATTORNEY GENERAL.--

"(1) IN GENERAL.--A recipient of a grant under this section shall annually prepare and submit to the Attorney General a report describing--

"(A) the number of minors, adults, and dependents assisted under this section; and

"(B) the types of housing assistance and support services provided under this section.

"(2) CONTENTS.--Each report prepared and submitted pursuant to paragraph (1) shall include information regarding--

"(A) the amount of housing assistance provided to each minor, adult, or dependent, assisted under this section and the reason for that assistance;

"(B) the number of months each minor, adult, or dependent, received assistance under this section;

"(C) the number of minors, adults, and dependents who--

"(i) were eligible to receive assistance under this section; and

"(ii) were not provided with assistance under this section solely due to a lack of available housing; and

"(D) the type of support services provided to each minor, adult, or dependent, assisted under this section.

"(f) REPORT TO CONGRESS.--

"(1) REPORTING REQUIREMENT.--The Attorney General, with the Director of the Violence Against Women Office, shall annually prepare and submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report that contains a compilation of the information contained in the report submitted under subsection (e).

"(2) AVAILABILITY OF REPORT.--In order to coordinate efforts to assist the victims of domestic violence, the Attorney General, in coordination with the Director of the Violence Against Women Office, shall transmit a copy of the report submitted under paragraph (1) to--

"(A) the Office of Community Planning and Development at the United States Department of Housing and Urban Development; and

"(B) the Office of Women's Health at the United States Department of Health and Human Services.

"(g) AUTHORIZATION OF APPROPRIATIONS.--

***695** "(1) IN GENERAL.--There are authorized to be appropriated to carry out this section $30,000,000 for each

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of the fiscal years 2004 through 2008.

"(2) LIMITATIONS.--Of the amount made available to carry out this section in any fiscal year, not more than 3 percent may be used by the Attorney General for salaries and administrative expenses.

"(3) MINIMUM AMOUNT.--

"(A) IN GENERAL.--Except as provided in subparagraph (B), unless all eligible applications submitted by any States, units of local government, Indian tribes, or organizations within a State for a grant under this section have been funded, that State, together with the grantees within the State (other than Indian tribes), shall be allocated in each fiscal year, not less than 0.75 percent of the total amount appropriated in the fiscal year for grants pursuant to this section.

"(B) EXCEPTION.--The United States Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands shall each be allocated not less than 0.25 percent of the total amount appropriated in the fiscal year for grants pursuant to this section.".

Approved April 30, 2003.

LEGISLATIVE HISTORY--S. 151 (H.R. 1104):

HOUSE REPORTS: No. 108-47, Pt. 1 accompanying H.R. 1104 (Comm. on the Judiciary) and 108-66 (Comm. of Conference).

SENATE REPORTS: No. 108-2 (Comm. on the Judiciary).

CONGRESSIONAL RECORD, Vol. 149 (2003):

Feb. 24, considered and passed Senate.

Mar. 27, considered and passed House, amended, in lieu of H.R. 1104.

Apr. 10, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 39 (2003):

Apr. 30, Presidential remarks and statement.

PL 108-21, 2003 S 151

END OF DOCUMENT

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UNITED STATES OF AMERICA,
Plaintiff-Appellant, [redacted]. BRUCE CLAYTON PUGH, a.k.a. sknowgirl, a.k.a. alabamaprincess4, a.k.a. pgugh, Defendant-Appellee.
C.A.11,2008.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
[redacted].
BRUCE CLAYTON PUGH, a.k.a. sknowgirl, a.k.a. alabamaprincess4, a.k.a. pgugh, Defendant-Appellee.

No. 07-10183 D.C. Docket No. 06-00009-CR-WS

United States Court of Appeals, Eleventh Circuit.
(January 31, 2008)

Appeal from the United States District Court for the Southern District of Alabama

Before MARCUS and PRYOR, Circuit Judges, and HANCOCK [FN*], District Judge.

*. Honorable James Hughes Hancock, United States District Judge for the Northern District of Alabama, sitting by designation.

MARCUS, Circuit Judge:

This appeal tests the nature and extent of appellate review over sentencing under the new regime of advisory Sentencing Guidelines. After thorough review, we are constrained to conclude that even under the most recent Supreme Court precedent, affording substantial deference to the district court's sentencing determinations, the district court abused its discretion by imposing a probationary sentence on the defendant in this case.

Here, the government appealed from the non-custodial sentence of defendant Bruce Clayton Pugh ("Pugh"), who downloaded on his computer over a period of several years at least 68 images of child pornography, as well as videos of an adult male raping an infant girl and of a young girl performing oral sex on an adult male. The advisory Sentencing Guidelines range recommended for the offense to which Pugh pled guilty-knowing possession of images of child pornography that were mailed, shipped or transported by computer in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(A)-was 97 to 120 months' imprisonment. The district court nevertheless sentenced Pugh to a five-year probationary term. In so doing, the district court relied heavily on Pugh's history, characteristics and motive in imposing a non-custodial sentence for a crime that fell on the high end of the Guidelines sentencing table. But in our view, the district court did not provide a sufficiently compelling justification to support the degree of its variance, nor did it give any apparent weight to many other important statutory factors embodied by Congress in 18 U.S.C. § 3553(a) that must be considered at sentencing. As we see it, this probationary sentence utterly failed to adequately promote general deterrence, reflect the seriousness of Pugh's offense, show respect for the law, or address in any way the relevant Guidelines policy statements and directives. Accordingly, we hold that this sentence is unreasonable, and therefore vacate and remand so that the district court can re-calculate the defendant's sentence.

I.

The presentence report ("PSI") presented the following basic facts. During an investigation conducted in Oklahoma in May 2003, the FBI learned that Warren Paul Perkins, III, had emailed child pornography images to the America OnLine ("AOL") screen name "moonkiss." The FBI traced that screen name to Joyce Pugh, the defendant's sister and housemate, and obtained a warrant to search the computer systems and other related computer components owned by the Pughs. During a search of the Pugh home in Selma, Alabama in September 2003, a police detective observed several images of nude pubescent children in provocative poses in Pugh's computer files.

When interviewed on the day of the search by an FBI agent, Pugh said he downloaded child pornography images but then deleted them. Pugh added that he may have forwarded child pornography to the "list me" areas in chat rooms. Pugh told the FBI that he entered chat rooms on the Internet pretending to be an underaged female and that people would then email him child pornography images. He also admitted that he once saw an image on his computer of a man having sex with a two- or three-year old who had a dog collar around her neck.

A subsequent forensic examination of Pugh's

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computer by the FBI revealed some 70 images of child pornography, including a horrifying video of an infant girl being raped by an adult male, a video of a young girl performing oral sex on an adult male, and an image of male and female children engaged in sex acts with an adult male. There were ten known child victims-young boys and girls whose identities have been established by the government-in the images found on the defendant's computer.

The FBI interviewed Pugh again in March 2005. At this time, Pugh told the investigators that he went to the chat rooms pretending to be an underaged girl using the screen name "sknowgirl." Some users would send Pugh child pornography thinking he was a young girl. When erotica pictures came to him from other users, Pugh would separate them, save them, and send them to other users under the pretense that he was the subject of the pictures. According to Pugh, men were always trying to pick him up over the Internet, and he justified his pretense by thinking that he was keeping the men away from "real children."

He said that everyone in the chat rooms sent him child pornography images, even though he asked them for adult pornography. Pugh explained that he actively sought adult "bondage" and "scat" pornography, [FN1] not the child pornography that others sent him, and that he never looked for child pornography on the Internet. Pugh offered that he did not want the pictures, which did not arouse him; rather, he only wanted to talk. However, he knew that his pretense would in fact cause people to send him child pornography.

> 1. In Pugh's case, the "scat" images on his computer depicted women defecating in each other's mouths.

In a January 2006 indictment, Pugh was charged by a federal grand jury sitting in the Southern District of Alabama with receipt and distribution of images of child pornography by computer in violation of 18 U.S.C. § 2252A(a)(2) and (b)(1) (count one); possession of images of child pornography that had been mailed, shipped or transported by computer in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(A) (count two); and receipt of obscene matter by interactive computer service in violation of 18 U.S.C. § 1462 (count three). In March 2006, Pugh pled guilty to the possession count embodied in Count Two, pursuant to a written plea agreement.

As part of the plea agreement, Pugh admitted to "knowingly possess[ing] a computer[ ] and compact disc which contained more than 3 images of child pornography ..." in violation of 18 U.S.C. § 2252A(a)(5)(B). Pugh further admitted that a forensic examination of his computer revealed that he had approximately 68 images and two videos of child pornography, which had been downloaded from the internet using AOL.

These images included the following:

yungcumpusjpg: a video of a female infant with an adult male penis penetrating the infant's vagina. The adult male has ejaculated and semen is on the surface of the infant's labia.

xxxjob.mpeg: a video of a child approximately 12 years of age performing oral sex on an adult male.

(1).jpg: phot[o] of a boy and girl both of whom are approximately 8 years of age and the girl has the penis of an adult male in her mouth.

Pugh also admitted to connecting to the internet using AOL, visiting chat rooms pretending to be an underaged child, and viewing the child pornography sent to him by others in the chat rooms.

Using the 2002 Guidelines Manual, as supplemented on April 30, 2003, the probation officer determined Pugh's base offense level to be 17 under U.S.S.G. § 2G2.2. The offense level then was enhanced 2 levels under U.S.S.G. § 2G2.2(b)(1) because the material involved prepubescent minors or minors under age 12; 5 levels under U.S.S.G. § 2G2.2(b)(2)(B) because the offense involved distribution for the receipt of child pornography but not for pecuniary gain; 4 levels under U.S.S.G. § 2G2.2(b)(3) because the material portrayed sadistic or masochistic conduct or other depictions of violence; 2 levels under U.S.S.G. § 2G2.2(b)(5) for use of a computer or interactive computer service; and 3 levels under U.S.S.G. § 2G2.2(b)(6) for more than 150 but fewer than 300 images. [FN2] Subtracting 3 levels for acceptance of responsibility under U.S.S.G. § 3E1.1, Pugh's adjusted offense level was 30, and his criminal history category was level I. Thus, the advisory Sentencing Guidelines yielded a range of 97-120 months' imprisonment.

> 2. Pugh admitted possessing 68 still images *plus* 2 video clips, each of which counted as 75 images under clarifying amendment 664

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> of the 2004 Guidelines Manual (providing that "[e]ach video, video-clip, movie or similar recording shall be considered to have 75 images"), and U.S.S.G. § 1B1.11(b)(2) (directing that "[t]he court shall use the Guidelines Manual in effect on the date that the defendant is sentenced").

At the sentencing hearing, the district court adopted the PSI as published. Pugh's counsel then called John Frank Warren, III, Ph.D., ("Warren") to testify concerning Pugh's mental state and likelihood of recidivism. Warren, a clinical and forensic psychologist, testified that in his opinion, Pugh presented a "low-risk" on a "low-moderate-high" risk assessment scale, which measures an offender's risk of re-offending, but recognized that "no one is a no risk." Warren also opined that Pugh was not a pedophile, and was not addicted to child pornography, but rather, was addicted to adult pornography, an addiction that developed as a result of an abusive home life. Warren observed that in the late 1990s, Pugh had sought mental health treatment for his pornography addiction, but none of the therapists or the psychiatrist he met with addressed his concerns, and eventually, he stopped going.

Warren further suggested that Pugh would be "easy pickings for more predatory or sociopathic peers" in a prison setting and that a prison sentence could lead Pugh to "more maladaptive coping and, arguably, a higher risk status following additional victimization." According to Warren, Pugh is receiving treatment from a psychologist in Selma, Alabama.

Warren acknowledged that he had viewed a video from Pugh's computer in which an adult male raped an infant female, and admitted that this experience would have a "horrible impact" on the child victim. Warren also explained that the impact on the children depicted in the other pornographic images on Pugh's computer was "very detrimental," and offered, "that's the reason we have laws about child pornography." Finally, when questioned by the district court, Warren testified he had not diagnosed most defendants in the prior child pornography cases he worked on as pedophiles-in fact, he had diagnosed only two of about 45 or 50 as pedophiles-which he said was consistent with the literature. Warren added that in contrast to Pugh, however, most defendants in child pornography cases are diagnosed as having Internet child pornography paraphilia.

Pugh then addressed the district court about the charges. [FN3] Following counsel's arguments, the district court concluded that it needed additional information before sentencing Pugh, and set a second sentencing hearing to take further testimony on these issues. In December 2006, at Pugh's second sentencing hearing, FBI Special Agents Fred Haynes ("Haynes") and [redacted] Glaser ("Glaser") testified concerning their interviews with Pugh. Haynes specifically testified that during the first interview he conducted with the defendant in 2003, Pugh said that he had downloaded child pornography and that there were possibly hundreds of images on his computer. Pugh said that he did not actively seek the child pornography and never searched for it on the Internet but that he had seen it. He explained that it was sent to him while he was pretending to be an underaged person in chat rooms, which he claimed he did because "he felt like ... [by doing so] he was keeping the child predators away from the children." Notably, Pugh "admit[ted]" to Haynes "that he had forwarded child pornography to others on his list in the chat rooms." During a second interview in 2005, Haynes and Glaser showed Pugh images retrieved from his computer. Pugh said that when he first started receiving child pornography images, he reported the senders to AOL. Haynes and Glaser asked Pugh why he did not stop soliciting the child pornography and Pugh responded that he was "addicted to it." [FN4]

> 3. The PSI also referenced an incident in November 2004 involving Pugh's great-niece.

The FBI was contacted by Patricia Smith ("Smith"), another sister of Pugh's, who told them that she had been driving home from church with one of her daughters and her granddaughter. While in the car, her granddaughter had told her, "Mee Maw, know what? Uncle Bruce told me that he licked the hair off a girl." Ms. Smith asked the girl to repeat herself, and she said, "Uncle Bruce said he licked the hair off a girl's crotch, and she licked his off."

Warren testified that he was skeptical of the story involving Pugh's great-niece. He said that in his experience working with and evaluating children of abuse, children "misinterpret a lot of things" and "incorporate something they've seen in a movie versus something they saw mommy do versus something they heard about at school. It comes out as a narrative that very often doesn't match what actually occurs." Warren concluded, "I discounted [this information] and found it relatively fantastic." Pugh also testified

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about his interpretation of what happened with his great-niece, which was consistent with the earlier statements of Warren and defense counsel. Pugh's mother and his sisters Joyce and Brenda also testified on Pugh's behalf; his mother and Joyce discounted the allegation regarding Pugh's great-niece.

After two sentencing hearings in which the district court took testimony on this issue, ultimately no factual findings were made regarding whether or how the incident occurred.

4. The record is confusing as to what Pugh exactly admitted to being addicted to during

the FBI interviews-whether it was child pornography or internet conversations. Specifically, Special Agent Haynes testified that Pugh admitted in his second interview that "he was addicted to the conversations." Haynes later testified that when he asked Pugh why he didn't just stop eliciting the child pornography, Pugh responded "that he was addicted to it," and on cross-examination, Haynes answered yes when asked if "[Haynes] said that [Pugh] said that [Pugh] was addicted to child porn," and when asked if "[Pugh] told [Haynes] [Pugh] was addicted to the conversations he was having in the chat rooms." Pugh testified that he knew they were talking about child pornography at the second interview (when the alleged addiction comment was made), but explained, "I was nervous. I wish I hadn't said some of the things I had."

Haynes further testified that during the interviews, Pugh understood the difference between child pornography and adult pornography. On cross-examination, when asked if Pugh might have said that he was addicted to the chat room conversations that resulted in him receiving child pornography, as opposed to being addicted to the child pornography, Haynes would not concede that he and Pugh had misunderstood each other.

Glaser testified that as a certified "Computer Analysis and Response Team" or "CART" examiner, he had examined Pugh's computers. Glaser found images of obscene adult pornography and of child pornography on the machines. Glaser confirmed that there were 10 known victims-children whose identities have been established by the government-in the child pornography found on Pugh's computer. Glaser had no prior experience with a defendant like Pugh, who entered chat rooms disguised as a child to obtain adult pornography. Glaser said there were 118,000 images on Pugh's computers, but most of those images were not pornographic. Of the 118,000 images, Glaser estimated that more than 1000 of the images were pornographic. Of those 1000-plus images, Glaser said that approximately 60 images were child pornography.

Pugh then testified. As for his first interview with Haynes, Pugh said that he did not know at the beginning of the questioning that the FBI agents were talking about child as opposed to adult pornography. When asked why he did not clarify his statements after he learned that Haynes had been talking about child pornography, Pugh said: "I was too scared to say anything because I've seen movies, court shows where you say that you want to change your statement, they could use that against you, saying, oh, he's changing his story, you know." Regarding his habit of entering chat rooms disguised as a girl, Pugh explained that he was looking for conversation:

When I first got AOL, I had tried to be myself, and people would not talk to me. And a friend of mine at the time had instant-messaged me with a female name, and he said, hey Bruce, it's me, Mark. And that's what gave me the idea of pretending to be a girl. And I'd go into a chat room, and you could type in 14, female, you know, describe what your age and sex is, and I would get instant messages galore. And I was like, oh, this is the way to go. But I was looking for chat. I never pushed it towards sexual chat. It was the males that I talked to that would push it towards sexual chat. I know it was wrong, but I would go along with it because I did enjoy talking to people.

Following counsel's arguments, the district court adopted the findings and the calculations embodied in the PSI yielding an adjusted offense level of 30 and a criminal history category I, with a resulting advisory sentencing range of *97 to 120 months*. Noting the seriousness of Pugh's crime and Congress's harsh treatment of it, the district court then explained its decision to impose a completely non-custodial sentence.

The district court explained that Pugh had no significant criminal history, and no history that would suggest he had or would abuse children. The court determined that Pugh's possession of child pornography was "passive" and "incidental" to his actual goal of developing online relationships, even though Pugh pretended to be an underaged female in these online chats and occasionally sent child pornography to others. [FN5] The court observed that Pugh took steps to minimize the receipt of child

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pornography by reporting it and talking about it with his mother, and the court noted that he had voluntarily entered treatment for addiction to adult pornography.

5. The district court actually said that Pugh "produced" child pornography, but because there is no evidence of production in the record, we assume the district court meant "distribution" rather than production. The evidence concerning distribution, as we have already noted, includes Special Agent Haynes's testimony that Pugh "admit[ted] to [him] that he had forwarded child pornography to others on his list in the chat rooms."

The district court then cited to Warren's opinion that Pugh was not a pedophile and presented a low risk of re-offending, that Pugh would not benefit from a custodial sentence, and that Pugh was addicted to adult, but not child pornography. The court also noted that Pugh had not re-offended since his arrest and had been compliant with the court's pre-sentencing orders. The court contrasted Pugh's case with other defendants who pay for or actively solicit child pornography, and concluded that an "unusual sentence for an unusual case" was necessary, and that it was "convinced" that it would "never" see Pugh again.

The district court proceeded to sentence Pugh to a five-year probationary term on the conditions that Pugh (1) continue his mental health treatment; (2) not possess a computer with internet access; (3) consent to periodic, unannounced examinations of any computer equipment he possessed; (4) submit to searches based on reasonable suspicion; and (5) register with the state sex-offender registry.

After the district court denied the United States's motion to reconsider the sentence and impose either a sentence within the Guidelines, or a sentence of at least one day in prison followed by a life term of supervised release, the United States timely appealed the sentence arguing that it was so disproportionately light in view of the seriousness of the offense that it amounted to an abuse of discretion, and was, therefore, unreasonable.

II.

Because the law of sentencing has been changing rapidly, we begin by providing some analysis of its current state. In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the mandatory Guidelines system codified in the Sentence Reform Act of 1984, 18 U.S.C. § 3551 et seq., 28 U.S.C. §§ 991-998 ("SRA")-which had been enacted to reduce the unwarranted disparities that had plagued the previous discretionary sentencing regime, *id.* at 250, 252, 253, 255, 256, 264, 267-violated the Sixth Amendment. *Id.* at 232-35. In its place, the Court identified two features of the SRA that would remain and work together "to move sentencing in Congress' preferred direction." *Id.* at 264. The first was a continued important role for the Sentencing Guidelines. *See id.* at 264-65. Specifically, the Court held that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264.

The second was the continuation of appellate review. While *Booker* held that sentences could no longer be reviewed *de novo,* it determined that appellate courts thereafter would apply a "reasonableness" standard of review. According to Justice Stevens, the Court "expressly equated" reasonableness review "with the old abuse-of-discretion standard used to review sentencing departures." *Rita v. United States*, 127 S.Ct. 2456, 2471 n.2 (2007) (Stevens, J., joined by Ginsburg, J., concurring). As the Court explained in *Booker,* "reasonableness" standards are "not foreign to sentencing law." 543 U.S. at 262. "The Act has long required their use in important sentencing circumstances-both on review of departures, *see* 18 U.S.C. § 3742(e)(3) (1994 ed.), and on review of sentences imposed where there was no applicable Guideline, *see* §§ 3742(a)(4), (b)(4), (e)(4)." *Id.* (citing *United States v. White Face*, 383 F.3d 733, 737-40 (8th Cir.2004); *United States v. Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir.2004); *United States v. Salinas*, 365 F.3d 582, 588-90 (7th Cir.2004); *United States v. Cook*, 291 F.3d 1297, 1300-02 (11th Cir.2002); *United States v. Olabanji*, 268 F.3d 636, 637-39 (9th Cir.2001); *United States v. Ramirez-[redacted]*, 241 F.3d 37, 40-41 (1st Cir.2001)); *see also United States v. Winingear*, 422 F.3d 1241, 1246 (11th Cir.2005) (per curiam) ("Before *Booker,* we reviewed departures from the Guidelines for reasonableness."). *Booker* recognized that reasonableness review could not "provide the uniformity that Congress originally sought" when it enacted the SRA and its original scheme of mandatory Guidelines. 543 U.S. at 263. Nevertheless, reasonableness review would still "tend to iron out sentencing differences." *Id.*

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Booker further held that in performing this review, we must measure "reasonableness" against the factors outlined by Congress in 18 U.S.C. § 3553(a). [FN6] *Booker*, 543 U.S. at 261. The Supreme Court explained that the factors contained in Section 3553(a) would not only "guide" the district courts in sentencing, but that "[t]hose factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Id.*; *accord Winingear*, 422 F.3d at 1246; *see also United States v. Talley*, 431 F.3d 784, 788 (11th Cir.2005) (per curiam) ("We must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a)."). We have also held that the burden of establishing that a sentence is unreasonable lies with the party challenging the sentence. *Talley*, 431 F.3d at 788.

6. Section 3553(a) provides the following considerations for the court to consider:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for ... the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[;]

(5) any pertinent policy statement[;]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

The next opportunity the Supreme Court had to address the new sentencing regime came in *Rita v. United States*, 127 S.Ct. 2456 (2007), where the Court concluded that appellate courts could properly presume that a sentence imposed within a properly calculated Sentencing Guidelines range was reasonable. In reaching this conclusion, the Court unambiguously said that appellate courts must apply "reasonableness" review to a district court's sentence, which "merely asks whether the trial court abused its discretion." 127 S.Ct. at 2465. *Rita* also explained that "[w]here the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." 127 S.Ct. at 2468.

The Supreme Court most recently addressed sentencing in *Gall v. United States*, 128 S.Ct. 586 (2007), and *Kimbrough v. United States*, 128 S.Ct. 558 (2007). [FN7] *Gall* reviewed the reasonableness of a sentence falling far below the range recommended by the Guidelines (a probationary term instead of a sentence falling within the Guidelines range of 30-36 months' imprisonment), and specifically addressed "whether a court of appeals may apply a 'proportionality test,' and require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances." 128 S.Ct. at 591. The Court determined that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse-of-discretion standard." *Id.*

7. *Kimbrough* primarily involved issues related to the Guidelines for crack cocaine offenses.

In its analysis, *Gall* reiterated that "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Id.* at 596. *Gall* further emphasized that "after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.*

Gall also repeated that appellate review of sentencing decisions employs the "familiar abuse-of-discretion standard of review," *id.* at 594, and then created a two-step process for conducting that review: first, the appellate court "must ... ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly

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erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *Gall,* 128 S.Ct. at 597. The first step-aimed at addressing "procedural" errors-highlights the continued importance of the Guidelines, and the *Booker* Court's intention that the "continued use of the Guidelines in an advisory fashion would further the purposes of Congress in creating the sentencing system to be honest, fair, and rational." *Talley,* 431 F.3d at 787. So although the Court "reject [ed] ... an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range ... [or] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence," it nonetheless repeatedly emphasized that "appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines." *Gall,* 128 S.Ct. at 595.

> Indeed, *Gall* explained that a district judge must make an individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and *ensure that the justification is sufficiently compelling to support the degree of the variance.* We find it uncontroversial that *a major departure should be supported by a more significant justification than a minor one.*

Id. at 597 (emphases added). Thus, not only must the district courts "consult th[e] Guidelines and take them into account when sentencing,"*Booker,* 543 U.S. at 264, they must properly calculate the Guidelines range *and*"includ[e] an explanation for any deviation from the Guidelines range." *Gall,* 128 S.Ct. at 597.

After an appellate court has determined that "the district court's sentencing decision is procedurally sound,"*Gall* directs that "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* at 597. The Court explained:

> When conducting this review, the court will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range. If the sentence is within the Guidelines range, the appellate court may, but is not required to, apply a presumption of reasonableness. But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

Id. (citation omitted).

Gall reminds us once again, as Pugh suggests, to appreciate the institutional advantage that district courts have in applying and weighing the Section 3553(a) factors in individual cases. Nonetheless, it also remains true that the district court's choice of sentence is not unfettered. Again, *Gall* makes clear that the district court is obliged to "consider *all* of the § 3553(a) factors to determine whether they support the sentence requested by a party." 128 S.Ct. at 596-97 (emphasis added). The Section 3553(a)"factors in turn ... guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker,* 543 U.S. at 261;*accord Winingear,* 422 F.3d at 1246;*see also Talley,* 431 F.3d at 788 ("We must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a)."). The appellate court "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall,* 128 S.Ct. at 597.[FN8]

> 8. Because we review the "totality of circumstances," a district court need not discuss each Section 3553(a) factor, *Talley,* 431 F.3d at 786, although "[w]here the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Rita,* 127 S.Ct. at 2468.

These directives leave no doubt that an appellate court may still overturn a substantively unreasonable sentence, albeit only after examining it through the prism of abuse of discretion, and that appellate review has not been extinguished. Thus, a sentence still may be substantively unreasonable if it does "not achieve the purposes of sentencing stated in § 3553(a)." *United States v. Martin,* 455 F.3d 1227, 1237 (11th Cir.2006). So, even though we afford "due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance,"*Gall,* 128 S.Ct. at 597, we may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. We are

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therefore still required to make the calculus ourselves, and are obliged to remand for resentencing "if we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. McBride*, No. 06-16544, 2007 WL 4555205, at *3 (11th Cir. Dec. 28, 2007) (internal quotation marks omitted); *United States v. Clay*, 483 F.3d 739, 743 (11th Cir.2007); *cf. United States v. Fernandez*, 443 F.3d 19, 34-35 (2d Cir.2006) (stating that "we will not second guess the weight (or lack thereof) that the judge accorded to a given factor ... [under § 3553(a)], as long as the sentence ultimately imposed is reasonable in light of *all* the circumstances presented" (emphasis added)). This standard of review is altogether consonant with our traditional use of the abuse-of-discretion standard, under which we will reverse only if "we find that the district court has made a clear error of judgment...." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir.2004) (en banc).

Moreover, a district court's unjustified reliance on any one Section 3553(a) factor may be a symptom of an unreasonable sentence. *See United States v. Crisp*, 454 F.3d 1285, 1292 (11th Cir.2006) (citing *United States v. Rattoballi*, 452 F.3d 127, 137 (2d Cir.2006); *United States v. Ture*, 450 F.3d 352, 358-59 (8th Cir.2006); *United States v. Hampton*, 441 F.3d 284, 288-89 (4th Cir.2006); *United States v. Cage*, 451 F.3d 585 (10th Cir.2006)); *accord United States v. Ward*, 506 F.3d 468, 478 (6th Cir.2007). Likewise, "[a] sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors [or] fails to consider pertinent section 3553(a) factors." *Ward*, 506 F.3d at 478 (internal quotation marks omitted); *see also United States v. Ausburn*, 502 F.3d 313, 328 (3d Cir.2007) (asking if the district court: "(1) exercised its discretion by giving meaningful consideration to the § 3553(a) factors; and (2) applied those factors reasonably by selecting a sentence grounded on reasons logical and consistent with the factors") (internal quotation marks omitted); *United States v. Willingham*, 497 F.3d 541, 543-44 (5th Cir.2007) (asking if sentence: "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors") (citation omitted); *United States v. Boleware*, 498 F.3d 859, 861 (8th Cir.2007) (same).

We hasten to add that while the application of these analyses may suggest an unreasonable sentence, they do not necessarily make a sentence unreasonable: *Gall* itself found that the district court did not commit reversible error simply because it "attached great weight" to a single factor. 128 S.Ct. at 600;*see United States v. Pauley*, No. 07-4270, 2007 WL 4555520, at *7 (4th Cir. Dec. 28, 2007). However, it remains uncontroverted that a sentence suffering from these "symptoms" *may* in fact be unreasonable, depending on an examination of the "totality of the circumstances." *Gall*, 128 S.Ct. at 597. And a review of the totality of the circumstances in this case through the lens of abuse of discretion yields the conclusion that Pugh's sentence is substantively unreasonable.

III.

The district court found "based on the facts of this case, based on [Pugh's] personal characteristics and history, and based on a consideration of all of the other factors," that Pugh did not deserve a Guidelines range-much less a custodial-sentence. In reciting its rationale, the district court focused primarily on *one* of the many Section 3553(a) factors-"the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). In particular, as we have noted, the district court emphasized that Pugh (1) was a first-time offender without a history suggesting that he had or would abuse children; (2) was addicted to adult pornography and had sought treatment for that addiction; (3) was not a pedophile and presented a low risk for recidivism, according to a psychologist who evaluated him; and (4) complied with the terms and conditions of his pretrial supervision. The district court further found that Pugh's possession offense was "passive" and "incidental" to his actual goal of developing online relationships, and that Pugh had taken steps to report his receipt of child pornography to AOL and his family.

To be sure, we appreciate the thoughtfulness and care taken by the district court in sentencing Pugh-the court held two sentencing hearings, and deliberated extensively over its sentencing decision in this case. We also recognize the wide discretion afforded to district courts in sentencing, especially since the district court is in a "superior position to find facts and judge their import." *Gall*, 128 S.Ct. at 597 (internal quotation marks omitted). Accordingly, we accept, as we must, the findings of fact made by the district court

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in this case; we discern no clear error in this regard.

We do, however, observe these additional salient facts that were elicited, and uncontroverted, at the sentencing hearings: Pugh intentionally posed as a teenage girl and knew that he would receive child pornography through this posture; Pugh derived a benefit from these images, as evidenced by Pugh's admission that "this [wa]s the way to go" for him to achieve his "goal" of communication; Pugh repeatedly downloaded the child pornography images and videos at least 70 times over a period of several years; Pugh forwarded some of these images to others in the chat room; the images were grotesque, and, as noted, included a video of an adult male raping an infant girl and a picture of an adult male having sex with a toddler with a dog collar around her neck; Pugh failed to report these images to the police; and the psychologist admitted that Pugh did not present "no" risk for recidivism. Likewise, we note that the federal penal code treats the possession of child pornography and child abuse as distinct offenses. [FN9]

9. *See, e.g., United States v. Goff,* 501 F.3d 250, 259 (3d Cir.2007) (where a defendant was charged with child pornography possession but "was not charged with molestation, ... pointing out that he hadn't committed it is, in one sense, irrelevant"); *United States v. Grosenheider,* 200 F.3d 321, 332-34 (5th Cir.2000) (collecting cases rejecting departures based on rationale that defendant had "not abused any child, and had no inclination, predisposition or tendency to do so").

Although the district court concluded, on these facts, that Pugh's conduct was "incidental" and "passive," his conduct was neither isolated, unintentional nor lawful. Nevertheless, Pugh argues in his supplemental brief that "the district judge regarded Pugh's passive and incidental, *as opposed to willful,* possession of the child pornography as a reasonable basis for giving him a less severe sentence than the sentences he has given to more typical child pornography offenders who solicit or purchase child pornography images." App'ee Supp. Br. at 19 (emphasis added). This argument misses the mark. Pugh seems to suggest that because the district court found that his ultimate *motive* was not to gather child pornography, somehow his crime was not "willful." But on this record there can be no dispute that Pugh downloaded and forwarded child pornography consciously, intentionally, deliberately, and voluntarily, regardless of whether the receipt of child pornography was his end goal or only a means by which to encourage others to "chat" with him. *Cf. Georgia Elec. Co. v. Marshall,* 595 F.2d 309, 318 (5th Cir.1979) ("a conscious, intentional, deliberate, voluntary decision, which, regardless of a venial motive, properly is described as willful") (internal quotation marks omitted). [FN10] Indeed, he pled to "knowingly possess[ing]" 68 images and two videos of child pornography. While motive may be a valid concern at sentencing, it cannot obliterate the knowing, deliberate and repeated means by which this serious crime was committed. *See, e.g., United States v. Carlson,* 498 F.3d 761, 766-67 (8th Cir.2007) (concluding that a district court's reliance on a defendant's intentions, which were "arguably better than a defendant who uses the funds for purely personal reasons" but nonetheless resulted in fraud on the government, "not particularly compelling" for a reduced sentence).

10. In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit that were rendered prior to October 1, 1981.

With this factual background in mind, we turn to whether (when viewed through the prism of abuse of discretion) the district court's sentence was substantively unreasonable. While undertaking this calculus, we are not limited to considering only the factors expounded upon by the district court; as the Supreme Court has made clear, Section 3553(a)"remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker,* 543 U.S. at 261. Indeed, we could not begin to review the reasonableness of a sentence without examining all of the relevant factors embodied in Section 3553(a).

Having reviewed all of those factors in the context of this case, we conclude that in imposing a non-custodial sentence, the district court performed a narrow, although intensive, analysis that minimized-and in some instances, ignored-many of the important Section 3553(a) concerns that we are directed to consider by Congress and the Supreme Court. *Id.; Gall,* 128 S.Ct. at 596. As we have already observed, a sentence may be unreasonable if it is grounded solely on one factor, relies on impermissible factors, or ignores relevant factors. *See supra* at _.At

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the end of the day, the sentence in this case is unreasonable, and the district court's analysis suffers from many of these "symptoms." We detail them below.

First, Pugh's sentence does not "afford adequate deterrence to criminal conduct,"*i.e.,* general deterrence. 18 U.S.C. § 3553(a)(2)(B); *Martin,* 455 F.3d at 1240. This factor-along with retribution, rehabilitation, and incapacitation-expressly makes up one of the four purposes of sentencing identified by Congress in Section 3553(a). *See*S.Rep. No. 98-225, at 75-76 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259 ("to deter others from committing the offense" is one of the four purposes of sentencing). Congress intended that courts consider *each* of these four stated factors "in imposing sentence in a particular case." *Id.* at 68, 75, 1984 U.S.C.C.A.N. at 3251, 3258; *id.* at 77, 1984 U.S.C.C.A.N. at 3260 ("The intent of subsection (a)(2) is ... to require that the judge consider what impact, if any, each particular purpose should have on the sentence in each case."). Indeed, as the Eighth Circuit has observed, "general deterrence ... is one of the key purposes of sentencing...." *United States [redacted] Medearis,* 451 F.3d 918, 920-21 (8th Cir.2006) (quotations omitted).

This is particularly compelling in the child pornography context, as the Seventh Circuit has aptly said:

Young children were raped in order to enable the production of the pornography that the defendant both downloaded and uploaded-both consumed himself and disseminated to others. The greater the customer demand for child pornography, the more that will be produced. Sentences influence behavior, or so at least Congress thought when in 18 U.S.C. § 3553(a) it made deterrence a statutory sentencing factor. The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.

United States [redacted] Goldberg, 491 F.3d 668, 672 (7th Cir.) (citations omitted), *cert. denied,*128 S.Ct. 666 (2007); *see also Goff,* 501 F.3d at 261 ("deterring the production of child pornography and protecting the children who are victimized by it are factors that should have been given significant weight at sentencing, but in fact received not a word from the District Court"). Pugh's probationary sentence, we think, tends to undermine the purpose of general deterrence, and in turn, tends to increase (in some palpable if unmeasurable way) the child pornography market. This problem is compounded not just because of the number of images Pugh downloaded over an extended time frame, but also because Pugh distributed some of the images to others.

Pugh suggests, however, that the district court's observation that it had imposed "harsh but ... appropriate sentences" in other cases adequately addressed general deterrence and respect for the law (a factor discussed below). Even if this statement could be read as touching, albeit tangentially, on these factors, we still cannot say that the resulting sentence fairly reflects their consideration. Indeed, it is unclear to us how the district court's sentences in other cases can be seen as explaining how a probationary sentence for possession of child pornography in this case promotes general deterrence or, for that matter, respect for the law. This seems to be especially true here where unlike in *Gall,* no other co-defendants were sentenced for the same crime that Pugh has committed. Quite simply, by imposing a non-custodial sentence, the district court accorded no weight to general deterrence.

Second, this sentence failed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A). As described in the legislative history of Section 3553(a):

This purpose-essentially the 'just deserts' concept-should be reflected clearly in all sentences; it is another way of saying that the sentence should reflect the gravity of the defendant's conduct. From the public's standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant's standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.

S.Rep. No. 98-225, at 75-76, 1984 U.S.C.C.A.N. at 3258-59. [FN11]

11. Notably, this notion of "just deserts" or retribution is a distinct consideration from general deterrence. *See United States [redacted] Foss,* 501 F.2d 522, 527 (1st Cir.1974) (cited with approval in the legislative history of Section 3553(a)) ("[T]he

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view that punishment should fit the offender has never yet been held to eliminate general deterrence as a factor to be considered along with others.... This is so even though general deterrence concerns itself not with the individual offender but with the sentence's impact on others.").

The contents of Pugh's computer contained depraved images, and there were 10 known (and countless unknown) victims in the 68 images and two videos. As the government emphasized and Pugh's own expert Warren conceded at the sentencing hearing, the pictures undeniably have a devastating impact on the young victims. In this connection, the Supreme Court has observed:

The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child....

It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Sexual molestation by adults is often involved in the production of child sexual performances. When such performances are recorded and distributed, the child's privacy interests are also invaded....

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children.... [T]he materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation....

As one authority has explained:

"[P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act,* 17 Wake Forest L.Rev. 535, 545 (1981). *See also* [Schoettle, *Child Exploitation: A Study of Child Pornography,* 19 J. Am. Acad. Child Psychiatry 289, 292 (1980)] ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation,* 12 U. Mich. J. Law Reform 295, 301 (1979) (interview with child psychiatrist) ("The victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child").

New York [redacted] *Ferber,* 458 U.S. 747, 758-59 & nn.9-10 (1982) (citations omitted); *see also United States* [redacted] *Yuknavich,* 419 F.3d 1302, 1310 (11th Cir.2005) ("possession of child pornography is not a victimless crime"); *Goff,* 501 F.3d at 259 ("Consumers such as Goff who 'merely' or 'passively' receive or possess child pornography directly contribute to this continuing victimization.").

Moreover, Pugh's possession-and distribution-of child pornography undeniably created the demand for more. *See Yuknavich,* 419 F.3d at 1310 ("A child somewhere was used to produce the images downloaded ..., in large part, because individuals like [the defendant] exist to download the images."). Indeed, Pugh's own expert, Warren, also conceded that Pugh contributed to the demand for child pornography, increasing the victimization of still more children. The Supreme Court has explained:

It is ... surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.... According to the State, since the time of our decision in *Ferber,* much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States have found it necessary to proscribe the possession of this material.... The State's ban on possession and viewing encourages the possessors of these materials to destroy them. [In addition] ..., encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Osborne [redacted] *Ohio,* 495 U.S. 103, 109-11 (1990); *see also United States* [redacted] *Williams,* 444 F.3d 1286, 1290 (11th Cir.2006) ("Our concern is not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children."), *cert. granted,*127 S.Ct. 1874 (2007); *United States* [redacted] *Davis,* 204 F.3d 1064, 1066 (11th Cir.1999) (per curiam) ("We have recently explained that the harm

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resulting from possession of child pornography occurs when one sustains a market for such pictures.") (citing *United States* [redacted] 146 F.3d 1281, 1285 (11th Cir.1998)); *Goff*, 501 F.3d at 260 ("[T]he consumer of child pornography 'creates a market' for the abuse by providing an economic motive for creating and distributing the materials.").

In short, regardless of Pugh's motive, his crime was a serious one, as recognized by Congress and the courts. Congress repeatedly has stressed the terrible harm child pornography inflicts on its victims, dating back to its first enactment of child pornography laws in 1977. [FN12] Since that time, it has not only made detailed findings, but has expanded repeatedly criminal exposure for the possession of child pornography:

> 12. Congressional findings appear throughout the following authorities:
>
> • The Senate Report on the Protection of Children Against Sexual Exploitation Act of 1977 recognized that: "the use of children as prostitutes or as the subjects of pornographic materials is very harmful to both the children and the society as a whole ... [; s]uch encounters cannot help but have a deep psychological, humiliating impact on these youngsters and jeopardize the possibility of healthy, affectionate relationships in the future ... [; and] such base and sordid activities ... may permanently traumatize and warp the minds of the children involved...." S. Rep. 95-438, at 4-9 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 41-46.
>
> • Findings in the Child Protection Act of 1984 recognized that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the individual child and to society." Pub.L. No. 98-292, § 2, 98 Stat. 204 (1984).
>
> • Findings in the Child Abuse Victims' Rights Act of 1986 recognized that "Congress has recognized the physiological, psychological, and emotional harm caused by the production, distribution, and display of child pornography by strengthening laws prescribing such activity." Pub.L. No. 99-500, § 702(2), 100 Stat. 1783 (1986).
>
> • Findings in the Child Pornography Prevention Act of 1996 recognized that: "(1) the use of children in the production of sexually explicit material, including photographs, films, videos, computer images, and other visual depictions, is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved; (2) where children are used in its production, child pornography permanently records the victim's abuse, and its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years; (3) child pornography is often used as part of a method of seducing other children into sexual activity; ... (7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come; ... (10)(A) the existence of and traffic in child pornographic images creates the potential for many types of harm in the community and presents a clear and present danger to all children; and (B) it inflames the desires of child molesters, pedophiles, and child pornographers who prey on children, thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children who are victimized as a result of the existence and use of these materials; (11)(A) the sexualization and eroticization of minors through any form of child pornographic images has a deleterious effect on all children by encouraging a societal perception of children as sexual objects and leading to further sexual abuse and exploitation of them; and (B) this sexualization of minors creates an unwholesome environment which affects the psychological, mental and emotional development of children and undermines the efforts of parents and families to encourage the sound mental, moral and emotional development of children...." Pub.L. No. 104-208, § 121, 110 Stat. 3009 (1996).
>
> • Findings in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 recognized that: "[c]hild pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children." Pub.L. No. 108-21, § 501(12), 117 Stat. 650 (2003).

1990. In Pub.L. No. 101-647, § 323, 104 Stat. 4789 (1990), codified at 18 U.S.C. § 2252(a)(4)(b), Congress proscribed the knowing possession of child pornography, adding to a statute that had made the knowing receipt of this material a crime;

1992. In Pub.L. No. 102-141, § 632, 105 Stat. 834 (1992), codified at 28 U.S.C. § 994 note, Congress directly amended the Guidelines provision addressing the offense of child pornography possession, increasing the base offense level by two levels;

1995. In Pub.L. No. 104-71, §§ 2, 3, 109 Stat. 774

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(1995), codified at 28 U.S.C. § 994 note, Congress again amended the Guidelines provision, increasing the base offense level by another two levels, and adding an enhancement if a computer was used to transport or ship the material;

1996. In Pub.L. No. 104-208, § 121, 110 Stat. 3009 (1996), codified at 18 U.S.C. § 2252A(a)(5)(B), Congress added another statutory provision for possession, almost identical to the existing one, but more targeted at the problem of new computer technologies; [FN13]

13. This is the offense to which Pugh pled guilty, 18 U.S.C. § 2252A(a)(5)(B).

1998. In Pub.L. No. 105-314, § 203, 112 Stat. 2974 (1998), codified at 18 U.S.C. §§ 2252(a)(4)(b) and 2252A(a)(5)(b), Congress amended the statutory provisions proscribing possession by reducing the number of images needed for conviction from three to one; and

2003. In Pub.L. No. 108-21, §§ 101, 401, 117 Stat. 650 (2003), codified at 18 U.S.C. § 3583(k) and 28 U.S.C. § 994 note, Congress increased the statutory maximum term of supervised release for child pornography possession to life, and directly amended the Guideline provision, adding an enhancement based on number of images.

In light of these detailed legislative findings and numerous legislative enactments, we cannot help but underscore the seriousness of this crime.

Although the district court recognized that child pornography is "a serious crime," the sentence it imposed did not reflect the seriousness of the crime. Nor did the sentence reflect any apparent consideration of promoting respect for the law. Even when measured through the lens of abuse-of-discretion review, these failings are conspicuous. *See, e.g., United States v. Perrin*, 478 F.3d 672, 676 (5th Cir.2007) ("Though it noted the severity of the offense, the court failed to explain how this severity, particularly the images' depravity and numerosity, factored into its decision to depart downward from the guideline range to the statutory minimum.").

Indeed, even Pugh recognized the significance of his crime, proffering to the district court that "a lengthy period of home confinement"*together* with a "lifetime" of supervised release would "address the seriousness of the offense and promote respect for the law as well provide adequate punishment." His resulting probationary sentence, on the contrary-without any home confinement or long-term supervised release-afforded precious little if any weight to the principles underlying 18 U.S.C. § 3553(a)(2)(A).

Third, the sentence imposed did not reflect consideration of "any pertinent policy statement," 18 U.S.C. § 3553(a)(5), despite the Guidelines' express policy statement for child pornography cases just like Pugh's. As early as the 2002 Guidelines Manual, the version applicable to Pugh's sentence, the relevant policy statement provided that, "[i]f the instant offense of conviction is a sex offense, the statutory *maximum* term of supervised release is recommended." U.S.S.G. § 5D1.2(c) (2002) (emphasis added). Concurrently, the statute itself directed that "the authorized term of supervised release for" a sex offense "involving a minor victim ... is any term of years or *life*." 18 U.S.C. § 3583(k) (emphasis added), *amended by* Pub.L. No. 109-248, § 141(e)(2), 120 Stat. 587 (2006); *see also United States v. Allison*, 447 F.3d 402, 407 (5th Cir.2006) (noting that "the policy statement recommending a life term of supervised release cannot be read in a vacuum, as the policy statement is derived from the statutory authority in 18 U.S.C. § 3583(k) and is consistent with Congress's intention to punish [sex offenders] with life terms of supervised release because of the high rate of recidivism") (footnote omitted).

The legislative history in 2003 surrounding the enactment of Section 3583(k) reveals that " 'Congress and the Sentencing Commission intended to impose life terms of supervised release on sex offenders. Congress explicitly recognized the high rate of recidivism in convicted sex offenders.' " *Perrin*, 478 F.3d at 678 (quoting *Allison*, 447 F.3d at 406 (citing in turn 18 U.S.C. § 3583(k); H.R.Rep. No. 108-66, *reprinted in* 2003 U.S.C.C.A.N. 683 (2003) (conf.report))). The Fifth Circuit has explained:

The legislative history of § 3583(k) states that the life term of supervised release was in response to the "long-standing concerns of Federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent

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with the need presented by many of these offenders for long-term and in some cases, life-long monitoring and oversight."

Allison, 447 F.3d at 405-06 (quoting H.R.Rep. No. 108-66, at 49-50 (2003), *reprinted in* 2003 U.S.C.C.A.N. 683, 684; and citing *United States v. Moriarty*, 429 F.3d 1012, 1025 (11th Cir.2005)). As the Fifth Circuit put it in another child pornography case, "[i]t is precisely this type of offender that supervised release was designed to rehabilitate." *United States v. Armendariz*, 451 F.3d 352, 362 n.6 (5th Cir.2006) (citing S.Rep. No. 98-225, at 124 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 ("[T]he primary goal [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.")); *see also United States v. Johnson*, 529 U.S. 53, 59 (2000) ("The objectives of supervised release would be unfulfilled if excess prison time were to offset and reduce terms of supervised release. Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration.") (citing S.Rep. No. 98-225, at 124 (1983)).

Yet the sentence imposed, which contains no period of supervised release, did not reflect the policy statement, the statute, or these underlying concerns.

Fourth, the sentence did not adequately reflect two related factors-the "kinds of sentences available" and "the sentencing range" established by the Guidelines. 18 U.S.C. § 3553(a)(3), (4). Nor did the district court "ensure that the justification [for the extent of its deviation from the Guidelines] [wa]s sufficiently compelling to support the degree of the variance." *Gall*, 128 S.Ct. at 597.

Pugh's adjusted offense level was 30, and his criminal history category was level I, making his offense fall into "Zone D" of the Sentencing Table. *See* Sentencing Table, U.S.S.G. § 5A. Notably, the Guidelines do not authorize a sentence of probation where the applicable Guidelines range is in Zone C or D of the Sentencing Table. *See*U.S.S.G. §§ 5B1.1 cmt. n.2, 5C1.1(f). In addition, as we've already noted, Section 3583(k) of the statute provides that "any term of years or life" of supervised release is mandated for sex offenders like Pugh, and the Guidelines recommend a *life* term of supervised release. *See supra* at __.As a result, this probationary sentence varies both from the recommended Guidelines range, and also from the "kinds of sentences" available under the Guidelines. *See*18 U.S.C. § 3553(a)(4). However, the district court did not so much as acknowledge that probation ordinarily was not available for this crime, nor that a life term of supervised release was recommended.

Furthermore, while the district court accepted the Guidelines calculation, and asked on the record whether "Mr. Pugh deserves a 97-month sentence," it did not give any real weight to the Guidelines range in imposing the sentence. Not only did the district court impose probation, which is not permitted under the now-advisory Guidelines regime, but it departed just about as much as it could-some 97 months for an offense with a Guidelines calculation of 97-120 months' imprisonment. The district court did not simply impose a 97-month downward variance; rather, it imposed a sentence of *zero* months' imprisonment.[FN14]

> 14. We recognize that because the statute contains no mandatory minimum, Congress understood that a judge could sentence a defendant to zero months' imprisonment. The Seventh Circuit has "imagine[d] a case, involving the downloading of a handful of images none showing any prepubescent child or depicting any sexual activity, yet still constituting child pornography (the statute defines 'child' as any minor and 'pornography' as including besides actual sexual activity 'lascivious exhibition of the genitals or pubic area,'18 U.S.C. §§ 2256(1), (2)(A)(v)), in which a permissible sentence might be light." *Goldberg*, 491 F.3d at 672. But plainly that is not the case here. While there may be other circumstances in which a non-custodial sentence may be reasonable, this is not one of them.

In the Supreme Court's parlance, the degree of variance imposed by the district court here-far greater than the 30-month variance imposed in *Gall*-is undeniably "major." *Gall*, 128 S.Ct. at 597. "In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the *degree* of variance into account and consider the

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extent of a deviation from the Guidelines." *Id.* at 595 (emphasis added). But the district court failed to even acknowledge that its sentence amounted to a 97-month variance, and its implicit explanation for the variance-simply relying on Pugh's characteristics and motive-hardly matches the degree of variance it imposed. Quite simply, in our view, the district court did not support this "major departure" with a "significant justification." *Id.* at 597. This failing is particularly telling in light of the importance the Supreme Court accorded this factor in *Gall.*[FN15]

15. The Supreme Court has recently held that a district judge has the authority to deviate from the Guidelines in a particular crack cocaine case because the Guidelines range for these offenses was based on "the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.' " *Kimbrough,* 128 S.Ct. at 575 (citation omitted). The Guidelines involved in Pugh's case, however, do not exhibit the deficiencies the Supreme Court identified in *Kimbrough.* First, the Guidelines range is derived at least in part from the early Parole Guidelines, rather than directly derived from Congressional mandate. *See, e.g.,* Revised Draft Sentencing Guidelines 72 (Jan.1987) ("The serious nature of th[e] offense [of transporting, receiving, or trafficking in material involving the sexual exploitation of a minor] is reflected in the enhancement for the distribution of material depicting minors under age twelve. The amount of enhancement reflects the time specified by the parole guidelines."). Second, there is no indication that either the Guidelines range or the policy statement involved in Pugh's sentence suffers from any criticisms like those *Kimbrough* identified for the crack cocaine Guidelines. There, the Supreme Court found that the Sentencing Commission itself had "reported that the crack/powder disparity produces disproportionately harsh sanctions." *Kimbrough,* 128 S.Ct. at 575. Here, the Sentencing Commission has not made any similar statements; rather, the Guidelines and policy statement are based in part upon Congress's longstanding concern for recidivism in such cases, *see supra* at _, and even Pugh's expert admitted that no one, including Pugh, presents "no" risk for recidivism.

Fifth, because the district court did not impose a substantial term of supervised release, the sentence did not adequately reflect the need to "protect the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). The district court brushed aside consideration of this purpose of sentencing-aimed at incapacitation-by simply concluding that it was "convinced that I will never see you again."

As Congress has found and as we have discussed, child sex offenders have appalling rates of recidivism and their crimes are under-reported. *See Allison,* 447 F.3d at 405-406. Yet because the district court did not impose any custodial sentence on Pugh-not even one day-by law it could not impose any term of supervised release. *See*18 U.S.C.A. § 3583(a) (a "defendant [may] be placed on a term of supervised release after imprisonment"); U.S.S.G. § 5D1.1; *United States v. Chavez,* 204 F.3d 1305, 1312-1313 (11th Cir.2000). And while the district court imposed some conditions on Pugh through probation (*e.g.,* continued mental health treatment, registering as sex offender, and random visits), Pugh's compliance with those conditions will be monitored for only 5 years.[FN16] This period of monitoring is extremely light for a child pornography offender. Had even a short term of imprisonment been imposed by the district court, Pugh could have been monitored for a substantial period of time, including the possibility of supervised release for the rest of his life, as permitted by the statutory penalties, 18 U.S.C. § 3583(k), and recommended by the Sentencing Commission.[FN17]

16. In *Gall,* the Supreme Court held that "[o]ffenders on probation are ... subject to several standard conditions that substantially restrict their liberty." 128 S.Ct. at 595. We do not dispute this, but note that *Gall* did not involve a child pornography offense, which involves different considerations for supervised release, including the characteristics associated with child pornography offenders and the Guidelines recommendation of a life term of supervised release for such offenders.

17. Moreover, even in cases not involving child sex offenses, supervised release is a stronger tool than probation. *See United States v. Reese,* 71 F.3d 582, 587-88 (6th Cir.1995) ("There is an inherent difference between probation and supervised release. When probation is revoked for a violation, the rules set forth in 18 U.S.C. § 3565 limit the term of resentencing to the term allowable under the original offense.... By contrast, a violation of supervised release may result in a cumulative punishment that exceeds the original prison sentence.").

Despite the district court's strong conviction that Pugh would not suffer from recidivism, the resulting

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sentence does not provide a sufficient mechanism to monitor Pugh for a lengthy time, and thus protect the public from any future crime, as contemplated in 18 U.S.C. § 3553(a)(2)(C). This omission is particularly striking, since Pugh himself agreed to a lifetime of supervised release. [FN18]

18. On this note, we also disagree with Pugh's suggestion that the district court appropriately relied on his "self-motivated rehabilitation" like the district court did in *Gall.* In *Gall,* the offender completely stopped committing the offending conduct years before his arrest; here, at best, Pugh unsuccessfully sought treatment for an adult pornography addiction prior to his arrest but nonetheless did not stop downloading child pornography. We add that it is unclear how a related Section 3553(a) factor-"the need ... to provide the defendant with needed ... medical care,"18 U.S.C. 3553(a)(2)(D)-was furthered by the sentence the district court imposed. Presumably Pugh could be subject to longer-term treatment had a substantial term of supervised release been imposed.

Sixth, and finally, the sentence did not adequately reflect "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). While the district court found Pugh to be at "the low end of the spectrum of possession," noting that the situation was "quite different from those I normally see," it nonetheless did not adequately explain how Pugh's non-custodial sentence avoided profound disparities with other similarly situated defendants.

Indeed, we have typically treated child sex offenses as serious crimes, upholding severe sentences in these cases. *See, e.g., United States v. Mauldin,* 224 F. App'x 915 (11th Cir.2007) (unpublished) (affirming 78-month sentence and life term of supervised release for possession of child pornography); *United States v. Hodnett,* 210 F. App'x 949 (11th Cir.2006) (unpublished) (affirming 360-month sentence and life term of supervised release for receipt, distribution, and possession of child pornography); *United States v. Thrift,* 205 F. App'x 816 (11th Cir.2006) (unpublished) (affirming 97-month sentence and life term of supervised release for use of internet to entice a minor to engage in sexual activity), *cert. denied,*127 S.Ct. 2143 (2007).

We have in some instances affirmed downward variances in these kinds of cases, but in each of them, substantial prison sentences had been imposed. *See, e.g., McBride,* 2007 WL 4555205 (affirming 84-month sentence for distribution of child pornography where Guidelines called for 151-188 months); *United States v. Bohannon,* 476 F.3d 1246 (11th Cir.) (affirming 120-month sentence for use of internet to entice minor into sexual activity where Guidelines called for 135-168 months), *cert. denied,*127 S.Ct. 2953 (2007); *United States v. Gray,* 453 F.3d 1323 (11th Cir.2006) (per curiam) (affirming 72-month sentence for distribution of child pornography where Guidelines called for 151-188 months); *United States v. Halsema,* 180 F. App'x 103 (11th Cir.2006) (unpublished) (affirming 24-month sentence for possession of child pornography where Guidelines called for 57-71 months). And in a similar case, another court upheld a substantial sentence, even though the defendant possessed many fewer images than Pugh. *See United States v. Nikonova,* 480 F.3d 371, 377 (5th Cir.) (affirming a 31-month sentence where the defendant possessed 13 images and the district court noted that, although the defendant may be "atypical," her offense fell "within the heartland of cases involving possession of child pornography"), *cert. denied,*128 S.Ct. 163 (2007).

In fact, Pugh has not cited and we cannot find a single case involving child pornography in which any court has upheld a non-custodial sentence like this one. [FN19] Rather, appellate courts have consistently overturned zero-imprisonment or other sharply downward-varying sentences in such cases on the ground that the resulting sentences were unreasonably lenient. *See, e.g., United States v. Fink,* 502 F.3d 585, 586 (6th Cir.2007) (vacating sentence of 70 months' imprisonment and five years' supervised release); *Goff,* 501 F.3d at 262 (vacating sentencing of four months' imprisonment and three years' supervised release); *Goldberg,* 491 F.3d at 668 (vacating sentence of one-day imprisonment and 10 years' supervised release); *United States v. Borho,* 485 F.3d 904 (6th Cir.2007) (vacating sentence of 72 months' imprisonment and 5 years' supervised release); *Perrin,* 478 F.3d at 672 (vacating sentence of 60 months' imprisonment and 10 years' supervised release); *Armendariz,* 451 F.3d at 352 (vacating sentence of five years' imprisonment and no supervised release). While these cases do not drive our decision, they do support the conclusion that the district court's probationary sentence will result in unwarranted disparities, further suggesting that the sentence imposed was unreasonable.

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19. We have located only one case in which an appellate court has upheld a non-imprisonment sentence for a child pornography offense-but in that unpublished decision of the Fifth Circuit, which incidentally lacks any detailed discussion, one year of house arrest was imposed. *See United States v. Polito*, 215 F. App'x 354 (5th Cir.2007).

IV.

Taking the Section 3553(a) factors as a whole as well as the district court's findings and calculus, we are constrained to conclude that Pugh's probationary sentence was unreasonable, and that the district court abused its discretion in imposing it. We recognize that the appropriate weight given to each of the factors cannot be calibrated with a slide rule *and* that the district court properly has been accorded great discretion in determining how to weigh those factors. However, the district court must give some weight to the factors in a manner that is at least loosely commensurate with their importance to the case, and in a way that "achieve[s] the purposes of sentencing stated in § 3553(a)." *Martin*, 455 F.3d at 1237. Where it does not, and instead "commit[s] a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case," we must remand for resentencing. *McBride*, 2007 WL 4555205, at *3 (internal quotation marks omitted). Indeed, if we could not say so here, we would come perilously close to holding that appellate review is limited to procedural irregularity, so long as the district court says it has reviewed all of the Section 3553(a) factors. We do not read Supreme Court precedent as having so eviscerated appellate review at the same time that it has mandated the appellate courts to continue to review sentences for reasonableness.

We, therefore, VACATE Pugh's sentence, and REMAND the case to the district court for further review and resentencing. In so doing, we do not suggest what that sentence should be. We hold only that a sentence of probation, without a single day in jail or any period of supervised release is an unreasonable one.

VACATED and **REMANDED**.

C.A.11,2008.

U.S. v. Pugh
--- F.3d ----, 2008 WL 253040 (C.A.11 (Ala.))

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435 F.3d 1100, 06 Cal. Daily Op. Serv. 696, 2006 Daily Journal D.A.R. 962
(Cite as: 435 F.3d 1100)

H
U.S. v. Clark
C.A.9 (Wash.),2006.

United States Court of Appeals,Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Michael Lewis CLARK, Defendant-Appellant.
No. 04-30249.

Argued and Submitted June 6, 2005.
Filed Jan. 25, 2006.

Background: Defendant was convicted in the United States District Court for the Western District of Washington, Robert S. Lasnik, J., 315 F.Supp.2d 1127, of violating the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act's (PROTECT Act) prohibition against traveling in foreign commerce to engage in a sexual act with a person under 18 years of age, and he appealed.

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

(1) extraterritorial application of PROTECT Act did not violate principles of international law;

(2) application of PROTECT Act to defendant did not violate due process; and

(3) enactment of PROTECT Act was a valid exercise of Congressional authority under the Foreign Commerce Clause.

Affirmed.

Ferguson, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Criminal Law 110 ⇐18

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k18 k. Extraterritorial Operation. Most Cited Cases
Extraterritorial application of Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act's (PROTECT Act) prohibition against traveling in foreign commerce to engage in a sexual act with a person under 18 years of age did not violate principles of international law; provision was exclusively targeted at extraterritorial conduct, and jurisdiction was based solely on a defendant's status as a U.S. citizen. 18 U.S.C.A. § 2423(c).

[2] Commerce 83 ⇐82.6

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.6 k. In General. Most Cited Cases

Infants 211 ⇐13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases
Two-month lapse in time between defendant's most recent transit between the United States and Cambodia and his arrest did not preclude application of Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act's (PROTECT Act) prohibition against traveling in foreign commerce to engage in a sexual act with a person under 18 years of age; government was not required to prove that the illicit sexual conduct took place while the defendant was literally still traveling. 18 U.S.C.A. § 2423(c).

[3] Constitutional Law 92 ⇐4560

92 Constitutional Law
92XXVII Due Process

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92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4560 k. Extraterritorial Application of Penal Laws. Most Cited Cases
(Formerly 92k259)

Criminal Law 110 ⇐18

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k18 k. Extraterritorial Operation. Most Cited Cases
Application to defendant of Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act's (PROTECT Act) prohibition against traveling in foreign commerce to engage in a sexual act with a person under 18 years of age, on basis of his sexual activities with children in Cambodia, did not violate Due Process Clause; defendant's American citizenship provided a sufficient nexus with the United States. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2423(c).

[4] Commerce 83 ⇐4

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k4 k. Commerce with Foreign Nations. Most Cited Cases

Commerce 83 ⇐8(1)

83 Commerce
83I Power to Regulate in General
83k2 Constitutional Grant of Power to Congress
83k8 Exclusive or Concurrent Powers of Congress and the States
83k8(1) k. In General; Application of State or Federal Law. Most Cited Cases
Congress's power over foreign commerce is exclusive and plenary. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Commerce 83 ⇐82.6

83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(J) Offenses and Prosecutions
83k82.5 Federal Offenses and Prosecutions
83k82.6 k. In General. Most Cited Cases

Infants 211 ⇐12(8)

211 Infants
211II Protection
211k12 Constitutional and Statutory Provisions
211k12(3) Validity
211k12(8) k. Crimes Against Infants. Most Cited Cases
Enactment of Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act's (PROTECT Act) prohibition against traveling in foreign commerce to engage in a sexual act with a person under 18 years of age was a valid exercise of Congressional authority under the Foreign Commerce Clause. U.S.C.A. Const. Art. 1, § 8, cl. 3; 18 U.S.C.A. § 2423(c).

***1101** Michael Filipovic, Assistant Federal Public Defender, Vicki W.W. Lai, Research and Writing Attorney, Federal Public Defender's Office, Seattle, WA, for the defendant-appellant.
John McKay, United States Attorney, Helen J. Brunner, John J. Lulejian, Susan B. Dohrmann, Assistant United States Attorneys, Seattle, WA, for the plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington;***1102** Robert S. Lasnik, District Judge, Presiding. D.C. No. CR-03-00406-L.

Before HUG, FERGUSON, and McKEOWN, Circuit Judges.

Opinion by Judge McKEOWN; Dissent by Judge FERGUSON.

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McKEOWN, Circuit Judge.

In this appeal we are confronted with a question of first impression regarding the scope of Congress's power under the Foreign Commerce Clause.FN1 At issue is whether Congress exceeded its authority "to regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, in enacting a statute that makes it a felony for any U.S. citizen who travels in "foreign commerce," i.e. to a foreign country, to then engage in an illegal commercial sex act with a minor. 18 U.S.C. § 2423(c). We hold that Congress acted within the bounds of its constitutional authority.

> FN1. We commend both counsel for their excellent and comprehensive briefing on this novel issue.

Congressional invocation of the Foreign Commerce Clause comes as no surprise in light of growing concern about U.S. citizens traveling abroad who engage in sex acts with children. The United States reiterated its commitment to quelling sexual abuse abroad by signing The Yokohama Global Commitment 2001, available at http://www.unicef.org/events/ yokohama/outcome.html (last visited Dec. 29, 2005), which was concluded at the Second World Congress Against the Commercial Sexual Exploitation of Children. The Commitment welcomes "new laws to criminalize [child prostitution], including provisions with extra-territorial effect." *Id.* Notably, in an explanatory statement attached to the Commitment, the United States emphasized that it "believes that the Optional Protocol [on child prostitution] and [the International Labour Organization's Convention No. 182 regarding child labor] provide a clear starting point for international action concerning the elimination of commercial sexual exploitation of children." *Id.*

Under the Commerce Clause, Congress has power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This seemingly simple grant of authority has been the source of much dispute, although very little of the controversy surrounds the "foreign Nations" prong of the clause. Cases involving the reach of the Foreign Commerce Clause vis-a-vis congressional authority to regulate our citizens' conduct abroad are few and far between. *See, e.g., United States [redacted] Bredimus,* 352 F.3d 200, 207-08 (5th Cir.2003) (affirming conviction under 18 U.S.C. § 2423(b), which reaches any person who travels in foreign commerce "for the purpose of" engaging in illicit sexual conduct).FN2 It is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny.

> FN2. As discussed in § IV(A), the cases arise primarily under the dormant Foreign Commerce Clause and invoke the interplay between state and federal authority.

The Supreme Court has long adhered to a framework for domestic commerce comprised of "three general categories of regulation in which Congress is authorized to engage under its commerce power,"*Gonzales [redacted] Raich,* 545U.S. 1, ----, 125 S.Ct. 2195, 2205, 162 L.Ed.2d 1 (2005):(1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See also United States [redacted] [redacted]* 514 U.S. 549, 558-59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Raich,* 125 S.Ct. at 2215 (Scalia, J., concurring) (noting that ***1103** for over thirty years, "our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories"). This framework developed in response to the unique federalism concerns that define congressional authority in the interstate context. [redacted] 514 U.S. at 557, 115 S.Ct. 1624 ("[T]he scope of the interstate commerce power 'must be considered in the light of our dual system of government ....' ") (quoting *NLRB [redacted] Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937)). No analogous framework exists for foreign commerce.

Further distinguishing the two spheres "is evidence that the Founders intended the scope of the

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foreign commerce power to be ... greater" as compared with interstate commerce. *Japan Line, Ltd. [redacted] County of Los Angeles,* 441 U.S. 434, 448, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979). This expansive latitude given to Congress over foreign commerce is sensible given that "Congress' power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty," whereas "[i]t has never been suggested that Congress' power to regulate foreign commerce could be so limited." *Id.* at 448 n. 13, 99 S.Ct. 1813.

Adapting the interstate commerce categories to foreign commerce in specific contexts is not an insurmountable task. *See, e.g., United States [redacted] Cummings,* 281 F.3d 1046, 1049 n. 1 (9th Cir.2002) (analyzing constitutionality of the International Parental Kidnaping Act, 18 U.S.C. § 1204(a), under [redacted] three-category approach). At times, however, this undertaking can feel like jamming a square peg into a round hole. Instead of slavishly marching down the path of grafting the interstate commerce framework onto foreign commerce, we step back and take a global, commonsense approach to the circumstance presented here: The illicit sexual conduct reached by the statute expressly includes commercial sex acts performed by a U.S. citizen on foreign soil. This conduct might be immoral and criminal, but it is also commercial. Where, as in this appeal, the defendant travels in foreign commerce to a foreign country and offers to pay a child to engage in sex acts, his conduct falls under the broad umbrella of foreign commerce and consequently within congressional authority under the Foreign Commerce Clause.

BACKGROUND

Michael Lewis Clark, a seventy-one year old U.S. citizen and military veteran, primarily resided in Cambodia from 1998 until his extradition in 2003. He typically took annual trips back to the United States and he also maintained real estate, bank accounts, investment accounts, a driver's license, and a mailing address in this country. Following a family visit in May 2003, Clark left Seattle and flew to Cambodia via Japan, Thailand, and Malaysia. He was traveling on a business visa that he renewed on an annual basis.

While in Cambodia, Clark came to the attention of Action Pour Les Enfants, a non-governmental organization whose mission is to rescue minor boys who have been sexually molested by non-Cambodians. Clark came under suspicion when street kids reported to social workers that he was molesting young boys on a regular basis. The organization in turn reported him to the Cambodian National Police. In late June 2003, the Cambodian police arrested Clark after discovering him in a Phnom Penh guesthouse engaging in sex acts with two boys who were approximately ten and thirteen years old. He was charged with debauchery. The United States government received permission from the Cambodian government to take jurisdiction over Clark.

***1104** U.S. officials-assisted by the Cambodian National Police and the Australian Federal Police-conducted an investigation that led to Clark's confession and extradition to the United States. As part of the investigation, the younger boy told authorities that he had engaged in sex acts with Clark because he needed money to buy food for his brother and sister. The older boy stated that Clark had hired him in the past to perform sex acts, on one occasion paying five dollars. Other young boys whom Clark had molested reported that they were paid about two dollars, and Clark stated that he routinely paid this amount. Clark acknowledged that he had been a pedophile since at least 1996, "maybe longer," and had been involved in sexual activity with approximately 40-50 children since he began traveling in 1996.

Upon his return to the United States, Clark was indicted under the provisions of the newly-enacted Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), Pub.L. No. 108-21, 117 Stat. 650 (2003).[FN3] He pled guilty to two counts under 18 U.S.C. § 2423(c) and (e) [FN4] but reserved the right to appeal his pre-trial motion to dismiss based

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on constitutional, jurisdictional, and statutory construction grounds. *See United States* [redacted] *Clark,* 315 F.Supp.2d 1127 (W.D.Wash.2004) (order denying Clark's motion to dismiss).

> FN3. Although Clark was reportedly the first person charged under the PROTECT Act's extraterritorial provisions, *see* Blaine Harden, *Veteran Indicted on Sex Charges; Man Is First Charged Under Protect Law's Provision on Tourism,* Wash. Post at A5 (Sept. 25, 2003), the U.S. Immigration and Customs Enforcement's "Operation Predator" reports that thirteen arrests had been made as of July 19, 2005, http://www.ice.gov/graphics/ news/factsheets/statistics.htm (last visited Dec. 29, 2005).

> FN4. Subsection (e) provides that an attempt or conspiracy to violate § 2423(c) shall be punishable in the same manner as a completed violation.

On appeal, Clark's challenge centers on the constitutionality of § 2423(c). Adopted in 2003 as part of the PROTECT Act, § 2423(c) provides as follows:

(c) Engaging in illicit sexual conduct in foreign places. Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

This provision was first proposed as part of the Sex Tourism Prohibition Improvement Act of 2002, H.R.Rep. No. 107-525 (2002). The "Constitutional Authority Statement" in the Report accompanying this Act expressly identified the Commerce Clause, article I, section 8 of the Constitution, as the authority for the legislation. *Id.* at 5. The purpose of the bill was "to make it a crime for a U.S. citizen to travel to another country and engage in illicit sexual conduct with minors." *Id.* The provision was not enacted, however, until it was added to the PROTECT Act the following year. *See*H.R.Rep. No. 108-66, at 5 (2003) (Conf.Rep.), *as reprinted in* 2003 U.S.C.C.A.N. 683. This section was incorporated verbatim into the 2003 legislation but the Report on the PROTECT Act does not include the prior reference to constitutional authority.

Before the PROTECT Act became law in 2003, § 2423(b) required the government to prove that the defendant "travel[ed] in foreign commerce, or conspire[d] to do so, for the *purpose of engaging in* " specified sexual conduct with a person under eighteen years of age. Violent Crime Control and Law Enforcement Act of 1994, Pub.L. 103-322, 108 Stat. 1796, Sec. 160001 ***1105** (1994) (codified as amended at 18 U.S.C. § 2423(b)) (emphasis added). The PROTECT Act replaced this single section with new subsections (b) through (g), with the new subsection (b) remaining substantively the same as the former subsection (b). Subsection (c) is an entirely new section which deletes the "for the purpose of" language.[FN5] The conference report accompanying the PROTECT Act explains that Congress removed the intent requirement from § 2423(c) so that "the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country." H.R.Rep. No. 108-66 at 51; *see also*H.R.Rep. No. 107-525, at 2 (same statement in report for failed 2002 bill). Consequently, for § 2423(c) to apply, the two key determinations are whether the defendant "travel[ed] in foreign commerce" and "engages in any illicit sexual conduct."

> FN5. Subsection (d) covers persons who provide ancillary services to facilitate travel "for the purpose of" engaging in illegal acts; subsection (e) covers attempt and conspiracy; subsection (f) cross-references the definition of "illegal sexual conduct" with other statutes; and subsection (g) provides a defense where the defendant in a commercial sex act case reasonably believed that the person was 18 years old. 18 U.S.C. § 2423(d)-(g).

The statute defines "illicit sexual conduct" in two ways: First, the definition includes "a sexual

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act (as defined in section 2246 [18 U.S.C. § 2246]) with a person under 18 years of age that would be in violation of chapter 109A[18 U.S.C. §§ 2241 et seq.] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 2423(f)(1). Chapter 109A, in turn, criminalizes various forms of sexual abuse including, for example, aggravated sexual abuse by force, threat, or other means, 18 U.S.C. § 2241(a)-(b); sexual abuse by threatening or placing that other person in fear, 18 U.S.C. § 2242; and sexual abuse of a minor or ward, 18 U.S.C. § 2243. These violations share the common characteristic that there is no economic component to the crime. In other words, they are non-commercial sex acts.

In contrast, the second prong of the definition covers "any commercial sex act (as defined in section 1591[18 U.S.C. § 1591]) with a person under 18 years of age." 18 U.S.C. § 2423(f)(2). "Commercial sex act," in turn, is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(c)(1). Clark acknowledges that his conduct qualifies as illicit sexual conduct, and he admitted in his plea agreement that he "intended to pay each of the boys and each of the boys expected such payment in exchange for the sexual encounter." Accordingly, it is this second "commercial sex act" prong that is at issue in Clark's appeal.

ANALYSIS

Clark does not dispute that he traveled in "foreign commerce," nor does he dispute that he engaged in illicit commercial sexual conduct. The challenge he raises is to congressional authority to regulate this conduct. In addition to his Commerce Clause challenge, Clark attacks his conviction on international law, statutory construction, and Due Process grounds.[FN6] In recognition of the principle that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration,"*County Court of Ulster County v. Allen,* 442 U.S. 140, 154, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), we begin our analysis with Clark's non-constitutional claims.

FN6. Clark initially raised issues related to his sentence but has since withdrawn this aspect of his appeal.

*1106 I. SECTION 2423(C) COMPORTS WITH THE PRINCIPLES OF INTERNATIONAL LAW

[1] We start with Clark's argument that extraterritorial application of § 2423(c) violates principles of international law.[FN7] On de novo review, *United States v. Felix-Gutierrez,* 940 F.2d 1200, 1203-04 (9th Cir.1991), we hold that extraterritorial application is proper based on the nationality principle.

FN7. Clark's challenge is distinct from the more common scenario where a party challenges only the extraterritorial reach of a statute without contesting congressional authority to enact the statute. *See, e.g., Small v. United States,* 544 U.S. 385, ----, 125 S.Ct. 1752, 1754, 161 L.Ed.2d 651 (2005) (holding that the phrase "convicted in any court" in a statute criminalizing firearm possession by a convicted felon, 18 U.S.C. § 922(g)(1), does not apply to extraterritorial convictions); *Timberlane Lumber Co. v. Bank of Am.,* 549 F.2d 597, 608-15 (9th Cir.1976) (discussing the extraterritorial reach of U.S. antitrust laws to activities in foreign countries), *superseded by statute as stated inMcGlinchy v. Shell Chemical Co.,* 845 F.2d 802, 813 n. 8 (9th Cir.1988); *United States v. Cotten,* 471 F.2d 744, 750 (9th Cir.1973) (holding that a statute proscribing theft of government property applied extraterritorially, and that the "law certainly represents an exercise by the Government of its right to defend itself from obstructions and frauds").

The legal presumption that Congress ordinarily intends federal statutes to have only domestic application, *see Small v. United States,* 544 U.S. 385,

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----, 125 S.Ct. 1752, 1755, 161 L.Ed.2d 651 (2005), is easily overcome in Clark's case because the text of § 2423(c) is explicit as to its application outside the United States. *See*18 U.S.C. § 2423(c) (titled "Engaging in illicit sexual conduct in foreign places" and reaching people "who travel[ ] in foreign commerce"); *see also Sale* [redacted] *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 176, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993) (explaining that there must be "affirmative evidence of intended extraterritorial application"). By its terms, the provision is exclusively targeted at extraterritorial conduct.

Having addressed this threshold issue, we ask whether the exercise of extraterritorial jurisdiction in this case comports with principles of international law. *See United States* [redacted] *Vasquez-Velasco,* 15 F.3d 833, 839 (9th Cir.1994) ("In determining whether a statute applies extraterritorially, we also presume that Congress does not intend to violate principles of international law.") (citing *McCulloch* [redacted] *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21-22, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963)); *see also United States* [redacted] *Neil,* 312 F.3d 419, 421 (9th Cir.2002). Of the five general principles that permit extraterritorial criminal jurisdiction,[FN8] the nationality principle most clearly applies to Clark's case. The nationality principle "permits a country to apply its statutes to extraterritorial acts of its own nationals." *United States* [redacted] *Hill,* 279 F.3d 731, 740 (9th Cir.2002). Jurisdiction based solely on the defendant's status as a U.S. citizen is firmly established by our precedent. *See, e.g., United States* [redacted] *Walczak,* 783 F.2d 852, 854 (9th Cir.1986) (holding that jurisdiction over a U.S. citizen who violated a federal statute while in Canada was proper under the nationality principle); *McKeel* [redacted] *Islamic Repub. of Iran,* 722 F.2d 582, 588 (9th Cir.1983) (noting that nationality principle permits states to punish the wrongful conduct of its citizens); *United States* [redacted] *King,* 552 F.2d 833, 851 (9th Cir.1976) (commenting that nationality principle would apply to U.S. citizen defendants). Clark's U.S. citizenship is uncontested.[FN9] ***1107** Accordingly, extraterritorial application of § 2423(c) to Clark's conduct is proper based on the nationality principle.[FN10]

FN8. The five jurisdictional bases are territorial, national, protective, universal, and passive personality. *See*Restatement (Third) of Foreign Relations Law of the United States § 402 (1987); *United States* [redacted] *Hill,* 279 F.3d 731, 739 (9th Cir.2002) (listing the five principles).

FN9. Because Clark is a U.S. citizen, we do not reach the issue whether reliance on the nationality principle is also proper when "alien[s] admitted for permanent residence" are prosecuted under § 2423(c). 18 U.S.C. § 2423(c).

FN10. Although the district court found that extraterritorial jurisdiction was proper under both the nationality principle and universality principle, *Clark,* 315 F.Supp.2d at 1131, we decline to address whether the universality principle also applies in Clark's case because extraterritorial application of a criminal law need be justified by only one of the five principles of extraterritorial authority. *See Chua Han Mow* [redacted] *United States,* 730 F.2d 1308, 1312 (9th Cir.1984).

Clark also seeks to invalidate the statute because, in his view, extraterritorial application is unreasonable. *See*Restatement (Third) of Foreign Relations Law of the United States § 403 (1987); *Vasquez-Velasco,* 15 F.3d at 840-41 (holding that extraterritorial application of U.S. statute to violent crimes associated with drug trafficking was reasonable under international law). The record provides no support for this argument. Clark cites no precedent in which extraterritorial application was found unreasonable in a similar situation. Cambodia consented to the United States taking jurisdiction and nothing suggests that Cambodia objected in any way to Clark's extradition and trial under U.S. law. Clark himself stated to a U.S. official in Cambodia that he "wanted to return to the United States" because he saw people dying in the Cambodian prison "and was very much afraid that if [he] stayed in that prison, [he] would not survive." Having been saved

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from immediate prosecution in Cambodia, it is somewhat ironic that he now challenges the law in a United States court.

II. CLARK'S CONDUCT FALLS WITHIN THE SCOPE OF § 2423(C)

Clark posits that § 2423(c) can be saved from constitutional scrutiny by interpreting it to require that the illicit sexual conduct take place while the defendant is literally still traveling. The district court declined to dismiss the indictment on this ground, explaining that "Clark is attempting to add elements to the crime ... that simply do not exist in the statute." *Clark,* 315 F.Supp.2d at 1130. We agree. Despite Clark's efforts to distance himself from the statute, we are unable to resolve this appeal by excising Clark's conduct from the reach of § 2423(c). *Cf. Jones* [redacted] *United States,* 529 U.S. 848, 850-51, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (avoiding constitutional challenge by construing statute's text to hold that certain owner-occupied residences do not qualify as property "used in" commerce).

[2] The statute is plain on its face: Section 2423(c) reaches "[a]ny United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person." It does not require that the conduct occur *while* traveling in foreign commerce. In Clark's case, the lapse in time between his most recent transit between the United States and Cambodia and his arrest was less than two months. We see no plausible reading of the statute that would exclude its application to Clark's conduct because of this limited gap.[FN11] Because the statute is unambiguous and Clark's conduct falls squarely within the class of persons whose conduct Congress intended to criminalize under this statute, we do not invoke the rule of lenity. *Jones,* 529 U.S. at 858, 120 S.Ct. 1904 ("ambiguity concerning the ambit***1108** of criminal statutes should be resolved in favor of lenity") (citation omitted).

> FN11. Whether a longer gap between the travel and the commercial sex act could trigger constitutional or other concerns is an issue we leave for another day.

The legislative history also supports the plain reading that we adopt. The conference report explains that Congress eliminated the intent requirement so that "the government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country." H.R.Rep. No. 108-66 at 51. From a practical perspective, it seems non-sensical for Congress to limit the scope of § 2423(c) to the unlikely scenario where the abuse occurs while the perpetrator is literally en route. This reading would eviscerate § 2423(c) by severely limiting its use to only those people who commit the offense while physically onboard an international flight, cruise, or other mode of transportation. We decline to adopt Clark's strained reading of the statute.

III. NO DUE PROCESS VIOLATIOn

[3] The next question is whether extraterritorial application of § 2423(c) violates the Due Process Clause of the Fifth Amendment because there is an insufficient nexus between Clark's conduct and the United States. We hold that, based on Clark's U.S. citizenship, application of § 2423(c) to his extraterritorial conduct is neither "arbitrary [n]or fundamentally unfair." *United States* [redacted] 905 F.2d 245, 249 (9th Cir.1990).[FN12]

> FN12. Although Clark's citizenship alone is sufficient to satisfy Due Process concerns, his U.S. investments, ongoing receipt of federal retirement benefits and use of U.S. military flights also underscore his multiple and continuing ties with this country.

Clark is correct that to comply with the Due Process Clause of the Fifth Amendment, extraterritorial application of federal criminal statutes requires the government to demonstrate a sufficient nexus between the defendant and the United States "so that such application would not be arbitrary or fundamentally unfair."*Davis,* 905 F.2d at 248-49.

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Indeed, "even resort to the Commerce Clause can[not] defy the standards of due process." *Sec'y of Agric.* [redacted] *Cent. Roig Refining Co.,* 338 U.S. 604, 616, 70 S.Ct. 403, 94 L.Ed. 381 (1950).

In *Blackmer* [redacted] *United States,* 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932), the Supreme Court explained that the extraterritorial application of U.S. law to its citizens abroad did not violate the Fifth Amendment. The Court declared that despite moving his residence to France, the U.S.-citizen defendant "continued to owe allegiance to the United States. By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country." *Id.* at 436, 52 S.Ct. 252. This longstanding principle that citizenship alone is sufficient to satisfy Due Process concerns still has force. Citing *Blackmer,* we recently affirmed that "[t]here is no doubt that the United States may exercise jurisdiction over American nationals living abroad, regardless of where the crime is committed." *United States* [redacted] *Corey,* 232 F.3d 1166, 1179 n. 9 (9th Cir.2000).

Clark offers no authority that calls into question this principle. Instead, he relies on cases that involved *foreign* nationals, which meant that the courts had no choice but to look beyond nationality to establish the defendants' ties with the United States. *See, e.g., United States* [redacted] *Klimavicius-Viloria,* 144 F.3d 1249, 1254 (9th Cir.1998) (defendant and crew "were all Columbians"); [redacted] 905 F.2d at 247 ("[redacted] is not a citizen of the United States.").

Clark is a U.S. citizen, a bond that "implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other." *Luria* [redacted] *United States,* 231 U.S. 9, 22, 34 S.Ct. 10, 58 L.Ed. 101 (1913). ***1109** Predicated on this imputed allegiance, application of § 2423(c) to Clark's extraterritorial conduct does not violate the Due Process Clause.[FN13] Having concluded that none of Clark's other arguments resolve this appeal, we turn to Clark's Commerce Clause challenge.

FN13. Clark also raises notice and vagueness challenges, neither of which withstands scrutiny. Section 2423(c) was enacted in April 2003-while Clark was visiting the United States-and the commercial sex act did not occur until June 2003. Mere "ignorance of the law will not excuse." *Shevlin-Carpenter Co.* [redacted] *Minn.,* 218 U.S. 57, 68, 30 S.Ct. 663, 54 L.Ed. 930 (1910). Clark might have been ignorant of the law, but he had constitutionally sufficient notice. We are not persuaded by Clark's argument that the statute's "travels in foreign commerce" language gave him "no reasonable basis" to anticipate being haled into a U.S. court. For a criminal statute to survive a vagueness challenge, we require only that "a reasonable person of ordinary intelligence would understand what conduct the statute prohibits." *United States* [redacted] *Lee,* 183 F.3d 1029, 1032 (9th Cir.1999). A reasonable person would easily understand § 2423(c) to cover Clark's travel to Cambodia and sexual conduct with minors there.

IV. CONGRESS'S FOREIGN COMMERCE CLAUSE POWER EXTENDS TO REGULATING COMMERCIAL SEX ACTS ABROAD

[4] In considering whether Congress exceeded its power under the Foreign Commerce Clause in enacting § 2423(c), we ground our analysis in the fundamental principle that "[i]t is an essential attribute of [Congress's power over foreign commerce] that it is exclusive and plenary." *Bd. of Trustees of Univ. of Ill.* [redacted] *United States,* 289 U.S. 48, 56, 53 S.Ct. 509, 77 L.Ed. 1025 (1933). We are further mindful of the Supreme Court's caution that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* [redacted] *Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). No plain showing has been made here. In light of Con-

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gress's sweeping powers over foreign commerce, we conclude that Congress acted within its constitutional bounds in criminalizing commercial sex acts committed by U.S. citizens who travel abroad in foreign commerce.[FN14]

FN14. Our review of the constitutionality of § 2423(c) is focused on congressional authority under the Commerce Clause. As pointed out by the Government, the Supreme Court once remarked in a case involving the delegation of legislative power to the Executive that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 315-16, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Standing alone, however, this reference does not establish that the Foreign Commerce Clause has no meaning or is without bounds. Nor does it necessarily mean that congressional regulation of external affairs has no limits. The Government has not argued-nor is there any indication in the legislation-that Congress enacted § 2423(c) based on an implied foreign affairs power. *Cf. United States v. Hernandez-Guerrero,* 147 F.3d 1075, 1077 (9th Cir.1998) (noting that in exercising immigration power, which falls into the arena of foreign affairs, "Congress is not subject to the rigid constraints that govern its authority in domestic contexts"). Nonetheless, given our charge to uphold the statute absent a plain showing that it is unconstitutional, *United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), we acknowledge that Congress's plenary authority over foreign affairs may also provide a sufficient basis for § 2423(c). *See, e.g., Curtiss-Wright Export Corp.,* 299 U.S. at 315, 57 S.Ct. 216; *United States v. Belmont,* 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) ("[C]omplete power over international affairs is in the national government ...").

At the outset, we highlight that § 2423(c) contemplates two types of "illicit ***1110** sexual conduct": non-commercial and commercial. Clark's conduct falls squarely under the second prong of the definition, which criminalizes "any commercial sex act ... with a person under 18 years of age." 18 U.S.C. § 2423(f)(2).[FN15] In view of this factual posture, we abide by the rule that courts have a "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration,"*County Court of Ulster County,* 442 U.S. at 154, 99 S.Ct. 2213, and limit our holding to § 2423(c)'s regulation of commercial sex acts.[FN16]

FN15. That the authorities arrested Clark before the money had actually changed hands is immaterial to our analysis. Clark does not dispute that he hired the boys to engage in sex acts with the promise of monetary payment, and the statute does not require that the victims be paid by the defendant prior to arrest. *See*18 U.S.C. § 2423(e) (providing that an attempt to violate § 2423(c) shall be punishable in the same manner as a completed violation). In fact, the second count to which Clark pled guilty was that he traveled in foreign commerce and "thereafter attempted to engage in illicit sexual conduct."

FN16. We do not decide the constitutionality of § 2423(c) with respect to illicit sexual conduct covered by the non-commercial prong of the statute, such as sex acts accomplished by use of force or threat. *See*18 U.S.C. § 2423(f) (defining "illicit sexual conduct" in part by reference to crimes listed under 18 U.S.C. §§ 2241 et seq.). The situation presented by § 2423(c) is distinct from challenges in which courts have carved out a discrete subset of conduct

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from a statute based on distinctions deduced from the statutory scheme. *See, e.g., Raich,* 125 S.Ct. at 2211 (disagreeing with this court's isolation of a "separate and distinct" class of activities beyond the reach of the federal statute and instead concluding that the subdivided class "was an essential part of the larger regulatory scheme"); *United States v. McCoy,* 323 F.3d 1114, 1115 (9th Cir.2003) (holding a statute unconstitutional as applied to the limited category of simple intra-state possession of child pornography that had not traveled in interstate commerce). Here, the statute is plain on its face in dividing the definition of "illicit sexual conduct" into two distinct, numbered prongs. We address only the prong that applies to Clark's conduct. This decision to limit our holding to commercial sex acts is an expression of judicial restraint, not an attempt to atomize a cohesive statutory scheme.

A. THE COMMERCE CLAUSE: STRUCTURE AND HISTORY

Chief Justice Marshall observed long ago that "[t]he objects, to which the power of regulating commerce might be directed, are divided into three distinct classes-foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct." *Cherokee Nation v. Georgia,* 30 U.S. 1, 18, 5 Pet. 1, 8 L.Ed. 25 (1831). Looking to the text, the single clause indeed embodies three subclauses for which distinct prepositional language is used: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

Among legal scholars there has been considerable debate over the intrasentence unity-or disunity, as the case may be-of the three subclauses, considering that they share the common language "[t]o regulate Commerce." Some commentators take the view that Congress's powers over commerce with foreign nations and Indian tribes are broader than over interstate commerce. *See, e.g.,* Kenneth M. Casebeer, *The Power to Regulate "Commerce with Foreign Nations" in a Global Economy and the Future of American Democracy: An Essay,* 56 U. Miami L.Rev. 25, 33-41 (2001); 1 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 4.2 (3d ed. 1999) ("Even during periods when the Justices were debating whether to significantly restrict the congressional power to regulate intrastate activities under the commerce power, there was no serious advocacy***1111** of restrictions on the federal powers in these other areas.").

Other scholars maintain that Congress has coextensive powers under the Commerce Clause's subdivisions. *See e.g.,* Louis Henkin, *Foreign Affairs and the Constitution* 70 n. 9 (1972) ("It is generally accepted, however, that the power of Congress is the same as regards both [foreign and interstate commerce]."); Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity,* 55 Ark. L.Rev. 1149, 1173 (2003) ("In practice, we have three different Commerce Clauses when text and history indicate that we ought to have but one."). Despite the long-running lively debate among scholars, no definitive view emerges regarding the relationship among the three subclauses. Nonetheless, Supreme Court precedent points to the conclusion that the Foreign Commerce Clause *is* different than the Interstate Commerce Clause. *See Japan Line,* 441 U.S. at 448, 99 S.Ct. 1813 ("[T]here is evidence that the Founders intended the scope of the foreign commerce power to be ... greater" as compared with interstate commerce.).

Regardless of how separate the three subclauses may be in theory, the reality is that they have been subject to markedly divergent treatment by the courts. This approach is not surprising given the considerably different interests at stake when Congress regulates in the various arenas. Most notably, regardless of whether the subject matter is drugs, gender-motivated violence, or gun possession, a prominent theme runs throughout the interstate commerce cases: concern for state sovereignty and federalism. On the other hand, "[t]he principle

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of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." *Bd. of Trustees of Univ. of Ill.,* 289 U.S. at 57, 53 S.Ct. 509. This distinction provides a crucial touchstone in applying the Foreign Commerce Clause, for which Congress's authority to regulate has not been defined with the precision set forth by [redacted] and *Morrison* in the interstate context.

We start with the component that has dominated judicial consideration of the Commerce Clause: "among the several States." After decades of expansive reading by the courts, *see, e.g., Katzenbach* [redacted] *McClung,* 379 U.S. 294, 303-04, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) ("[W]here we find that the legislators ... have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."), the mid-1990s saw a retrenchment in Commerce Clause jurisprudence beginning with the watershed case of [redacted] In [redacted] the Court held that a statute which criminalized possession of a firearm in a school zone was beyond Congress's Commerce Clause authority. 514 U.S. at 552, 115 S.Ct. 1624. In so holding, the Court stressed its concern that an overly expansive view of the Interstate Commerce Clause "would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557, 115 S.Ct. 1624 (quoting *NLRB* [redacted] *Jones & Laughlin Steel Corp.,* 301 U.S. at 37, 57 S.Ct. 615). The Court reiterated these concerns five years later in *Morrison* in striking down a provision under the Violence Against Women Act: "[T]he concern ... that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded." *Morrison,* 529 U.S. at 615, 120 S.Ct. 1740.

In addition to announcing a shift to a more constrained view of Congress's power over interstate commerce, [redacted] and *Morrison* ossified the three-category framework that the Court had long applied ***1112** to interstate commerce cases. *See* [redacted] 514 U.S. at 558-59, 115 S.Ct. 1624; *Morrison,* 529 U.S. at 609-14, 120 S.Ct. 1740; *see also Raich,* 125 S.Ct. at 2215 (Scalia, J., concurring) (noting that for over thirty years, "our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories"). As noted earlier, these three familiar categories are (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See* [redacted], 514 U.S. at 558-59, 115 S.Ct. 1624. Within the interstate commerce arena, the guiding force of [redacted] and *Morrison* quickly took firm hold, and lower courts have adhered closely to the three-prong structure. *See, e.g., United States* [redacted] *Adams,* 343 F.3d 1024, 1027-28 (9th Cir.2003) (reciting the three categories set out in [redacted] and *Morrison* and applying the third to a statute criminalizing the intrastate possession of child pornography).

This past term the Court introduced a new wrinkle in interstate commerce's jurisprudential fabric when it held that the Controlled Substances Act was a valid exercise of Congress's powers under the Commerce Clause. *See Raich,* 125 S.Ct. at 2201. *Raich* did not alter the fundamental three-prong rubric, but the Court took a more generous view of Congress's power over interstate commerce than seen in [redacted] and *Morrison.* Over the dissent's pointed objections, the majority concluded that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions." *Id.* at 2207. This "rational basis" for finding a nexus between home-consumed marijuana and the interstate market put the regulation "squarely within Congress' commerce power." *Id.* In tension with the majority's broad reading of Congress's power over interstate commerce, the dissent emphasized that setting "outer limits" to Congress's Commerce Clause powers "protect[s] historic spheres of state sovereignty from excessive federal encroachment." *Id.* at 2220 (O'Connor, J., dissenting).

Although the Supreme Court's view of the Interstate Commerce Clause has "evolved over time,"

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id. at 2205, Indian Commerce Clause jurisprudence has been more of a straight line proposition. *See, e.g., United States* [redacted] *Lara,* 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive' ... This Court has traditionally identified the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and the Treaty Clause, Art. II, § 2, cl. 2, as sources of that power.") (citations omitted). Indeed, the Supreme Court has commented on the "very different applications" of the Interstate and Indian Commerce Clause powers, explaining that interstate commerce jurisprudence "is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Cotton Petroleum Corp.* [redacted] *New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). In contrast to the federal government's relationship with the states, its relationship with Indian tribes is "based on a history of treaties and the assumption of a 'guardian-ward' status." *Morton* [redacted] *Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). The Commerce Clause stands as one of the main textual grants of Congress's plenary power to regulate this special relationship between the federal government and Indian tribes. *Id.* at 551-52, 94 S.Ct. 2474. In this context,***1113** the Court has defined Congress's authority under the Indian Commerce Clause without reference to the rigid categories of [redacted] and *Morrison. See, e.g., Lara,* 541 U.S. at 196, 200-207, 124 S.Ct. 1628 (upholding Congress's authority to adjust tribal sovereignty in criminal matters under the Indian Commerce Clause without considering the three-category framework).

As with the Indian Commerce Clause, the Foreign Commerce Clause has followed its own distinct evolutionary path. Born largely from a desire for uniform rules governing commercial relations with foreign countries, the Supreme Court has read the Foreign Commerce Clause as granting Congress sweeping powers. *See Bd. of Trustees of Univ. of Ill.,* 289 U.S. at 59, 53 S.Ct. 509 ("[W]ith respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power."); *see also* Rotunda & Nowak § 4.2 ("The Court has always recognized a plenary power in Congress to deal with matters touching upon foreign relations or foreign trade."); Robert J. Delahunty, *Federalism Beyond the Water's Edge: State Procurement Sanctions and Foreign Affairs,* 37 Stan. J. Int'l L. 1, 16-26 (2001) (describing the origins of the Foreign Commerce Clause). This view was laid down nearly two centuries ago when Chief Justice Marshall stated that "[i]t has, we believe, been universally admitted, that [the words of the Commerce Clause] comprehend every species of commercial intercourse between the United States and foreign nations." *Gibbons* [redacted] *Ogden,* 22 U.S. (9 Wheat) 1, 193, 6 L.Ed. 23 (1824).

The Court has been unwavering in reading Congress's power over foreign commerce broadly. *See, e.g., California Bankers Ass'n* [redacted] *Shultz,* 416 U.S. 21, 46, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) (stating that Congress's plenary authority over foreign commerce "is not open to dispute"); *Buttfield* [redacted] *Stranahan,* 192 U.S. 470, 492-93, 24 S.Ct. 349, 48 L.Ed. 525 (1904) (describing the "complete power of Congress over foreign commerce"); *Hartford Fire Ins. Co.* [redacted] *California,* 509 U.S. 764, 813-14, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993) (Scalia, J., dissenting) ("Congress has broad power under Article I, § 8, cl. 3, 'to regulate Commerce with foreign Nations,' and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected."). There is no counterpart to [redacted] or *Morrison* in the foreign commerce realm that would signal a retreat from the Court's expansive reading of the Foreign Commerce Clause. In fact, the Supreme Court has never struck down an act of Congress as exceeding its powers to regulate foreign commerce.

Federalism and state sovereignty concerns do not restrict Congress's power over foreign commerce, *see Japan Line,* 441 U.S. at 448 n. 13, 99 S.Ct. 1813, and the need for federal uniformity "is

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no less paramount" in assessing the so-called "dormant" implications of congressional power under the Foreign Commerce Clause. *Id.* at 449, 99 S.Ct. 1813; *see also Bd. of Trustees of Univ. of Ill.,* 289 U.S. at 59, 53 S.Ct. 509 (instrumentality of a state was not entitled to import articles duty free because "with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power"). By contrast, under the dormant Interstate Commerce Clause, "reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." *Southern Pac. Co. ▌ Ariz. ex rel. Sullivan,* 325 U.S. 761, 768-69, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945).

***1114** Clark's case illustrates the predominance of national interests and the absence of state sovereignty concerns in Foreign Commerce Clause jurisprudence. No state has voiced an interest in the proceedings nor is there an indication of any state interest at stake in determining the constitutionality of § 2423(c). Because this case is divorced from the common federal/state interplay seen in the Interstate Commerce Clause cases, we find ourselves in sparsely charted waters. We thus look to the text of § 2423(c) to discern whether it has a constitutionally tenable nexus with foreign commerce.

B. SECTION 2423(C)'S REGULATION OF COMMERCIAL SEX ACTS IS A VALID EXERCISE OF CONGRESS'S FOREIGN COMMERCE CLAUSE POWERS

[5] Taking a page from *Raich,* we review the statute under the traditional rational basis standard. *Raich,* 125 S.Ct. at 2211. The question we pose is whether the statute bears a rational relationship to Congress's authority under the Foreign Commerce Clause.

Although it is important to view the statute as a whole, parsing its elements illustrates why the statute fairly relates to foreign commerce. The elements that the government must prove under § 2423(c)'s commercial sex acts prong are straightforward. First, the defendant must "travel[ ] in foreign commerce." 18 U.S.C. § 2423(c). Second, the defendant must "engage[ ] in any illicit sexual conduct with another person,"*id.,* which in this case contemplates "any commercial sex act ... with a person under 18 years of age." 18 U.S.C. § 2423(f)(2). We hold that § 2423(c)'s combination of requiring travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree.

Beginning with the first element, the phrase "travels in foreign commerce" unequivocally establishes that Congress specifically invoked the Foreign Commerce Clause. The defendant must therefore have moved in foreign commerce at some point to trigger the statute. In Clark's case, he traveled from the United States to Cambodia.

"Foreign commerce" has been defined broadly for purposes of Title 18 of the U.S.Code, with the statutory definition reading, in full: "The term 'foreign commerce', as used in this title, includes commerce with a foreign country." 18 U.S.C. § 10. Admittedly, this definition is not particularly helpful given its rearrangement of the words being defined in the definition itself. Courts have understandably taken the broad wording to have an expansive reach. *See, e.g., United States ▌ Montford,* 27 F.3d 137, 139-40 (5th Cir.1994) (discerning that "Congress intended foreign commerce to mean travel to or from, or at least some form of contact with, a foreign state"); *Londos ▌ United States,* 240 F.2d 1, 6 (5th Cir.1957) (concluding that foreign commerce under § 10 "means passing to and fro"). We likewise see no basis on which to impose a constrained reading of "foreign commerce" under § 2423(c). Clark got on a plane in the United States and journeyed to Cambodia. This act is sufficient to satisfy the "travels in foreign commerce" element of § 2423(c).

Once in Cambodia, the second element of § 2423(c) was also met, namely, "engage[ment] in any illicit sexual conduct with another person,"18

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U.S.C. § 2423(c), which in this case was commercial sex under § 2423(f)(2). As the Supreme Court recognized centuries ago, the Commerce Clause "comprehend [s] every species of commercial intercourse between the United States and foreign nations." ***1115***Gibbons,* 22 U.S. at 193; *see also Bd. of Trustees of Univ. of Ill.,* 289 U.S. at 56-57, 53 S.Ct. 509 (same). Section 2423(c) regulates a pernicious "species of commercial intercourse": commercial sex acts with minors.

The statute expressly includes an economic component by defining "illicit sexual conduct," in pertinent part, as "any commercial sex act ... with a person under 18 years of age." 18 U.S.C. § 2423(f)(2). "Commercial sex act 'is defined as' any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(c)(1). Thus, in the most sterile terms, the statute covers the situation where a U.S. citizen engages in a commercial transaction through which money is exchanged for sex acts.

The essential economic character of the commercial sex acts regulated by § 2423(c) stands in contrast to the non-economic activities regulated by the statutes at issue in [redacted] and *Morrison. See Morrison,* 529 U.S. at 613, 120 S.Ct. 1740 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."); [redacted] 514 U.S. at 561, 115 S.Ct. 1624 (explaining that firearm possession statute was purely a criminal statute). In both [redacted] and *Morrison,* the Supreme Court voiced strong concerns over Congress's use of the Commerce Clause to enact "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Morrison,* 529 U.S. at 610, 120 S.Ct. 1740 (quoting [redacted] 514 U.S. at 561, 115 S.Ct. 1624). Like the statute regulating illicit drugs at issue in *Raich,* the activity regulated by the commercial sex prong of § 2423(c) is "quintessentially economic," FN17125 S.Ct. at 2211, and thus falls within foreign trade and commerce.[FN18]

FN17. The evolving definition of "economics" presents a slight quirk to the analysis. Although the definition in the 1966 Webster's Third New International Dictionary cited by the Supreme Court in *Raich* only refers to "the production, distribution, and consumption of commodities," more recent versions of Webster's have added "services" to the definition. *See, e.g.,* Merriam Webster's Collegiate Dictionary 364 (10th ed.1993) (defining "economics" as the social science concerned with "the production, distribution, and consumption of goods and services"); Merriam-Webster Online Dictionary, *available at* www.m-w.com (same) (last visited Dec. 29, 2005).

FN18. It is now universally acknowledged that foreign trade or commerce includes both goods and services. *See, e.g.,* Agreement Establishing the Multilateral Trade Organization [World Trade Organization], Dec. 15, 1993, 33 I.L.M. 13, pmbl. ("Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to ... expanding the production and trade in goods and services"); General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, pmbl. ("Recognizing the growing importance of trade in services for the growth and development of the world economy"); *cf. Gulf Oil Corp.* [redacted] *Copp Paving Co., Inc.,* 419 U.S. 186, 195, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974)(holding that, under the Interstate Commerce Clause, the " 'in commerce' language of the Clayton and Robinson-Patman Act provisions ... appears to denote only persons or activities within the flow of interstate commerce-the practical, economic continuity in the generation of *goods and services* for interstate markets and their transport and distribution to the consumer.") (emphasis added). *But see* [redacted] 514 U.S. at 585-89, 115 S.Ct. 1624 (arguing that "commerce" as understood at the time of the ratification of the

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> Constitution encompassed only bartering and trafficking in goods) (Thomas, J., concurring).

As in *Raich,* the fact that § 2423(c) has a criminal as well as an economic component does not put it beyond Congress's reach under the Foreign Commerce Clause. Indeed, § 2423(c) is far from unique in using the Foreign Commerce Clause to regulate crimes with an economic facet. *See, e.g., United States* [redacted] *Kay,* 359 F.3d 738, 741 (5th Cir.2004) (describing***1116** "particular instrumentalities of interstate and foreign commerce that defendants used or caused to be used in carrying out the purported bribery" in violation of the Foreign Corrupt Practices Act); *United States* [redacted] *Hsu,* 155 F.3d 189, 195-96 (3rd Cir.1998) (discussing statute enacted as part of the Economic Espionage Act of 1996 that criminalizes the theft of trade secrets related to products "produced for or placed in interstate or foreign commerce"); *United States* [redacted] *Gertz,* 249 F.2d 662, 666-67 (9th Cir.1957) (explaining that statute criminalizing the forging or counterfeiting of foreign currency is based on the Foreign Commerce Clause).

The combination of Clark's travel in foreign commerce and his conduct of an illicit commercial sex act in Cambodia shortly thereafter puts the statute squarely within Congress's Foreign Commerce Clause authority. In reaching this conclusion, we view the Foreign Commerce Clause independently from its domestic brethren.

Likewise, although our precedent illustrates that the inter-state categories may be adapted for use in specific foreign commerce contexts, *see, e.g., Cummings,* 281 F.3d at 1049 n. 1, the categories have never been deemed exclusive or mandatory, nor has the Supreme Court suggested their application in relation to the Foreign Commerce Clause. *Cf.* Prakash, 55 Ark. L.Rev. at 1166 ("Apparently, the Supreme Court has never discussed the applicability of the three-part [redacted] test to gauging the limits of the foreign commerce power."). The categories are a guide, not a straightjacket. In *Cummings,* we upheld the constitutionality of the International Parental Kidnaping Crime Act ("IPKCA"), 18 U.S.C. § 1204(a). *See*281 F.3d at 1051. In so holding, we applied the interstate commerce framework but noted that Congress has "broader power" in the foreign commerce area, and this context "is quite relevant to our inquiry." *Id.* at 1049 n. 1. Critical to this understanding was the Supreme Court's now familiar statement in *Japan Line* that "the Founders intended the scope of the foreign commerce power to be ... greater" as compared with interstate commerce. *Id.* (quoting *Japan Line,* 441 U.S. at 448, 99 S.Ct. 1813).

At times, forcing foreign commerce cases into the domestic commerce rubric is a bit like one of the stepsisters trying to don Cinderella's glass slipper; nonetheless, there is a good argument that, as found by the district court, § 2423(c) can also be viewed as a valid regulation of the "channels of commerce." Our previous decisions have recognized that Congress legitimately exercises its authority to regulate the channels of commerce where a crime committed on foreign soil is necessarily tied to travel in foreign commerce, even where the actual use of the channels has ceased. *See Cummings,* 281 F.3d at 1050-51.

Clark emphasizes that § 2423(b) requires that the foreign travel be with the specific intent to engage in illicit sex, whereas § 2423(c) does not have such a specific intent requirement. Although the intent element distinguishes the two statutory crimes, we do not see that it distinguishes the scope of Congress's Constitutional authority. Under § 2423(b), the crime is contained solely within the "travels in foreign commerce" provision of the statute. Under the crime charged in this case, § 2423(c) and (f)(2), the crime requires both foreign travel and engaging in an illicit commercial sex act. These are two different statutes with separate justifications under the Commerce Clause.

In sum, Clark has failed to demonstrate "a plain showing that Congress ... exceeded its constitutional bounds,"*Morrison,* 529 U.S. at 607, 120 S.Ct. 1740, in enacting §§ 2423(c) and (f)(2). Traveling to a foreign country and paying a child to

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***1117** engage in sex acts are indispensable ingredients of the crime to which Clark pled guilty. The fact that §§ 2423(c) and (f)(2) meld these economic and criminal components into a single statute does not put the conduct beyond Congress's reach under the Foreign Commerce Clause. The rational nexus requirement is met to a constitutionally sufficient degree. Congress did not exceed its power "to regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, in criminalizing commercial sex acts with minors committed by U.S. citizens abroad.

AFFIRMED.

FERGUSON, Circuit Judge, dissenting:

The Constitution cannot be interpreted according to the principle that the end justifies the means. The sexual abuse of children abroad is despicable, but we should not, and need not, refashion our Constitution to address it. The majority holds that "travel in foreign commerce, coupled with engagement in a commercial transaction while abroad, implicates foreign commerce to a constitutionally adequate degree." Maj. op. at 1114. I respectfully disagree.

The Constitution authorizes Congress "[t]o regulate Commerce with foreign Nations." Art. I, § 8, cl. 3. The activity regulated by 18 U.S.C. § 2423(c), illicit sexual conduct, does not in any sense of the phrase relate to commerce *with foreign nations.* Rather, § 2423(c) is a criminal statute that punishes private conduct fundamentally divorced from foreign commerce. Article I, section 8, clause 3, while giving Congress broad authority over our commercial relations with other nations, is not a grant of international police power. I respectfully dissent from the majority's assertion that the Commerce Clause authorizes Congress to regulate an activity with a bare economic component, as long as that activity occurs subsequent to some form of international travel. I also note that the conduct in this case will not go unpunished, as the reasonable course of action remains of recognizing Cambodia's authority to prosecute Clark under its own criminal laws.

I.

Our national government is a government of "enumerated powers," *see* U.S. Const. art. I, § 8, which presupposes powers that are not enumerated, and therefore not accorded to Congress, *see Gibbons* [redacted] *Ogden,* 22 U.S. (9 Wheat.) 1, 85, 6 L.Ed. 23 (1824). As such, the Commerce Clause is "subject to outer limits." *United States* [redacted] 514 U.S. 549, 556-57, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). Through a long line of cases, the Supreme Court has developed a tri-category framework that helps courts ascertain these outer limits, and whether a particular enactment exceeds them. *See, e.g., Gonzales* [redacted] *Raich,* 545 U.S. 1, ----, 125 S.Ct. 2195, 2205, 162 L.Ed.2d 1 (2005). In the foreign commerce context, the majority would replace this time-tested framework with its own broad standard: whether a statute "has a constitutionally tenable nexus with foreign commerce." Maj. op. at 1114. The majority views the foreign commerce prong of the Commerce Clause "independently from its domestic brethren," *id.* at 1116, though Congress's authority in both spheres is governed by the same constitutional language: "[t]o regulate Commerce," art. I, § 8, cl. 3. In so doing, the majority goes farther than our precedent counsels and dispenses with the tri-category framework that has grounded Commerce Clause analysis in the modern era.[FN1]

FN1. Though the majority asserts that it is applying "the traditional rational basis standard," maj. op. at 1114 (citing *Raich,* 125 S.Ct. at 2211), this statement is misleading to the extent that rationality review in the Commerce Clause context is applied as part of the "substantial effects" test, which is a more demanding inquiry than the open-ended "nexus" inquiry that the majority proposes. *Compare* [redacted] 514 U.S. at 561-63, 115 S.Ct. 1624,*with* maj. op. at 1114-17. Courts apply rationality review to assess whether Congress had a "rational basis" for concluding that a particular activity "substantially affects" interstate commerce, *Raich,* 125 S.Ct. at 2208, not to inquire generally "whether the stat-

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ute bears a rational relationship to Congress's authority under the [ ] Commerce Clause," maj. op. at 1114. *Raich* is further distinguished by the fact that Congress's power to effectuate a comprehensive regulatory scheme was central to that opinion, *see*125 S.Ct. at 2206-07, while no comparably general regulation of foreign commerce exists in this case.

***1118** The majority portrays the raison d'etre of the tri-category framework as addressing "unique federalism concerns that define congressional authority in the *interstate* context." Maj. op. at 1103 (emphasis added) (citing [redacted] 514 U.S. at 557, 115 S.Ct. 1624). It is thus able to conclude that this framework is generally inapplicable to foreign commerce cases. A fairer understanding of the tri-category framework is that it has evolved not only in response to federalism concerns that courts have read into Congress's Interstate Commerce power, but also to give content to what it means generally "[t]o regulate Commerce," art. I, § 8, cl. 3. *Cf.* [redacted] 514 U.S. at 551, 115 S.Ct. 1624 (citing not only federalism concerns in invalidating 18 U.S.C. § 922(q), but also the fact that the statute "neither regulates a commercial activity nor contains a requirement that the [gun] possession be connected in any way to interstate commerce"); *United States* [redacted] *Morrison,* 529 U.S. 598, 610, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) (noting that "the noneconomic, criminal nature of the conduct at issue" was central to the Supreme Court's decision in [redacted]). While Congress's authority to regulate foreign commerce may well be broader than its authority to regulate interstate commerce, *see, e.g., Japan Line, Ltd.* [redacted] *County of Los Angeles,* 441 U.S. 434, 448, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979), its authority in the foreign sphere is not different in kind. In both spheres, Congress is only authorized "[t]o regulate Commerce," art. I, § 8, cl. 3, and not those activities that are fundamentally divorced from commerce. So while the majority correctly notes that "[f]ederalism and state sovereignty concerns do not restrict Congress's power over foreign commerce," maj. op. at 1113, it fails properly to consider the restrictions on the scope of Congress's Foreign Commerce power that emanate from the constitutional text itself, which the tri-category framework also helps elucidate.

II.

Under the tri-category framework, and contrary to the District Court's conclusion, § 2423(c) is not a regulation of the channels of foreign commerce. Section 2423(c) lacks any of the tangible links to the channels of commerce that would justify upholding it under Congress's Foreign Commerce power.

The Supreme Court has held that Congress's authority to regulate the channels of commerce encompasses keeping those channels "free from immoral and injurious uses." *Heart of Atlanta Motel, Inc.* [redacted] *United States,* 379 U.S. 241, 256, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (internal quotation marks omitted). Thus, Congress has the authority to criminalize the international transport of children for the purpose of sexual exploitation in the U.S. because such transport is an immoral and injurious use of the channels of commerce. *Cf. United States* [redacted] *Hersh,* 297 F.3d 1233, 1238 (11th Cir.2002) (upholding the conviction of a defendant who transported a Honduran boy to Florida to engage in ***1119** sexual relations). Congress also has the authority to criminalize travel "for the purpose" of engaging in illicit sexual conduct, since travel with such harmful intent constitutes an injurious use of the channels of foreign commerce. *See, e.g., United States* [redacted] *Bredimus,* 352 F.3d 200, 207-08 (5th Cir.2003).[FN2] We have not necessarily limited Congress's reach under its channels of commerce authority based on the cessation of movement. Thus, this Court found it a proper congressional exercise in *United States* [redacted] *Cummings* to prevent persons from retaining children abroad after they first made use of the channels of foreign commerce wrongfully to remove the children from the U.S. 281 F.3d 1046, 1050 (9th Cir.2002); *see also United States* [redacted] *Shahani-Jahromi,* 286 F.Supp.2d 723, 734 (E.D.Va.2003) (holding that wrongful retention of a child in a foreign country, which im-

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peded that child's travel back to the U.S. through the channels of commerce, provided a sufficient basis for Congress to exercise its Foreign Commerce power).

> FN2. The statute upheld in *Bredimus* was the former 18 U.S.C. § 2423(b), which preceded the present statute and which included an intent requirement.

Under this rubric, the current 18 U.S.C. § 2423(b) contains a defensible link to the channels of foreign commerce, as it covers people who "[t]ravel with intent to engage in illicit sexual conduct." *See, e.g.,* Nick Madigan, *Man, 86, Convicted Under New Law Against Americans Who Go Abroad to Molest Minors,* N.Y. Times, Nov. 20, 2004, at A12 (defendant was arrested at Los Angeles International Airport with "dozens of pornographic photographs of himself with Filipino girls, sex toys and 100 pounds of chocolate and candy"). The activity regulated by § 2423(b), intention to engage in illicit sexual conduct, is at least tenably related to the channels of commerce in that the defendant engages in travel *with illegitimate ends.* The person indicted under § 2423(b) has a plane ticket in hand, has paid a travel agent to set up the trip, or has otherwise committed an act that is both wrongful (because of the criminal intent) and tangibly related to the channels of commerce.

By contrast, § 2423(c) neither punishes the act of traveling in foreign commerce, or the wrongful use or impediment of use of the channels of foreign commerce. Rather, it punishes future conduct in a foreign country entirely divorced from the act of traveling except for the fact that the travel occurs at some point prior to the regulated conduct. The statute does not require any wrongful intent at the time the channel is being used, nor does it require a temporal link between the "travel[ ] in foreign commerce," 18 U.S.C. § 2423(c), and the underlying regulated activity.

The majority suggests that § 2423(c)"can[ ] be viewed as a valid regulation of the 'channels of commerce,' " maj. op. at 1116, because Congress's channels of commerce authority extends to regulating crimes committed abroad that are "necessarily tied to travel in foreign commerce,"*id.* But whereas the requisite ties to the channels of commerce exist in the case the majority cites, *Cummings,* 281 F.3d 1046, these ties are entirely absent in § 2423(c). The statute in *Cummings* prohibited conduct-wrongful retention of children abroad-that was necessarily tied to injurious uses of the channels of commerce. The defendant in *Cummings* illegally transported his children to Germany so that he could retain them there, and his wrongful retention of them necessarily impeded their lawful use of the channels of commerce to return to the U.S. By contrast, § 2423(c) regulates an activity that is in no way connected to the wrongful use, or impediment of use, of the channels of foreign commerce. Section 2423(c) only ***1120** requires that the regulated conduct occur *at some point* subsequent-perhaps even years subsequent-to international travel. The travel may well be lawful-the statute does not require any criminal intent during travel, nor does it otherwise connect the regulated activity to an abuse of the channels of commerce.

The mere act of boarding an international flight, without more, is insufficient to bring all of Clark's downstream activities that involve an exchange of value within the ambit of Congress's Foreign Commerce power. On some level, every act by a U.S. citizen abroad takes place subsequent to an international flight or some form of "travel[ ] in foreign commerce." 18 U.S.C. § 2423(c). This cannot mean that every act with a bare economic component that occurs downstream from that travel is subject to regulation by the United States under its Foreign Commerce power, or the Commerce Clause will have been converted into a general grant of police power. It is telling to note that, theoretically, the only U.S. citizens who could fall outside the reach of § 2423(c) if they engage in illicit sexual conduct abroad are those who never set foot in the United States (i.e., U.S. citizens by virtue of their parent's citizenship), and thus never travel in "Commerce with foreign Nations." Art. I, § 8, cl. 3. In short, § 2423(c) is divorced from its asserted Commerce Clause underpinnings. The statute does

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not set another "guidepost" regarding Congress's Foreign Commerce power, *contra United States [redacted]. Clark,* 315 F.Supp.2d 1127, 1135 (W.D.Wash.2004)-it exceeds it.

III.

Rather than engaging in a losing "channels of commerce" analysis, the majority applies a general "rational nexus" standard in this case, maj. op. at 1117, and strains to find more foreign commerce in § 2423(c) than the act of boarding an international flight. Specifically, the majority characterizes the crime regulated by § 2423(c), illicit sexual conduct, as sufficiently related to "Commerce with foreign Nations," art. I, § 8, cl. 3, to bring it under Congress's Foreign Commerce authority.

First, the underlying regulated activity is not "quintessentially economic," maj. op. at 1115, simply because it has a bare economic aspect. Just as "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity,"*Morrison,* 529 U.S. at 613, 120 S.Ct. 1740, neither is "illicit sexual conduct." The plain purpose of § 2423(c) is to regulate criminal conduct, not commerce. As the Supreme Court cautioned in [redacted] "depending on the level of generality, any activity can be looked upon as commercial." 514 U.S. at 565, 115 S.Ct. 1624.

Further, the underlying act, even if considered economic or commercial, is certainly not a presence of commerce *with foreign nations.* In the most sterile terms, an act of paid sex with a minor that takes place overseas is not an act of commerce with other nations. Under the interpretation of the majority, the purchase of a lunch in France by an American citizen who traveled there by airplane would constitute a constitutional act of engaging in foreign commerce. Under such an interpretation, Congress could have the power to regulate the overseas activities of U.S. citizens many months or years after they had concluded their travel in foreign commerce, as long as the activities involved some sort of exchange of value-even if the partner in exchange was a U.S. entity that funneled the value back into the American economy. Analogously, the statute here does not even facially limit its application to sex with foreign minors in an effort to create a tenable link to "Commerce with foreign Nations." Art. I, § 8, cl. 3. This observation may seem slightly absurd, but so is the task of trying to show ***1121** how sexual abuse of a minor overseas by a U.S. citizen constitutes an act of "Commerce with foreign Nations." *Id.*

IV.

Viewed as a whole, it is clear that § 2423(c) does not relate to "Commerce with foreign Nations." *Id.* Nor is § 2423(c) a constitutional exercise of Congress's authority to regulate the channels of commerce. Sexual exploitation of children by foreigners is thoroughly condemnable, but the question before us is whether Congress properly invoked its power "[t]o regulate Commerce with foreign Nations,"*id.,* in enacting § 2423(c) to address this problem. It did not. I therefore respectfully dissent.

C.A.9 (Wash.),2006.
U.S. [redacted]. Clark
435 F.3d 1100, 06 Cal. Daily Op. Serv. 696, 2006 Daily Journal D.A.R. 962

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Approved: _____
BOYD M. JOHNSON III
RITA GLAVIN
DANIEL STEIN
Assistant United States Attorneys

Before: HONORABLE RONALD L. ELLIS
United States Magistrate Judge
Southern District of New York

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- -X

UNITED STATES OF AMERICA :

- v. - :

MARK BRENER, :
a/k/a "Michael,"
CECIL SUWAL, :
a/k/a "Katie,"
a/k/a "Kate," :
TEMEKA RACHELLE LEWIS,
a/k/a "Rachelle," and :
TANYA HOLLANDER,
a/k/a "Tania Hollander," :

Defendants. :

- -X

SEALED COMPLAINT

Violations of
18 U.S.C. §§ 371, 1952,
2421, 2422, 1956

COUNTY OF OFFENSE:
NEW YORK

SOUTHERN DISTRICT OF NEW YORK, ss.:

KENNETH HOSEY, being duly sworn, deposes and says that he is a Special Agent with the Federal Bureau of Investigation, and charges as follows:

COUNT ONE

1. From in or about December 2004 to in or about March 2008, in the Southern District of New York and elsewhere, MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," and TANYA HOLLANDER, a/k/a "Tania Hollander," the defendants, and others known and unknown, unlawfully, willfully, and knowingly did combine, conspire, confederate, and agree together and with each other to violate Sections 1952(a)(3), 2421, and 2422(a) of Title 18, United States Code.

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2. It was a part and an object of the conspiracy that MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," and TANYA HOLLANDER, a/k/a "Tania Hollander," the defendants, and others known and unknown, would and did use and cause to be used facilities in interstate commerce, to wit, cellular telephones and e-mail, with intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, a business enterprise involving prostitution offenses in violation of applicable State law, and thereafter did perform and attempt to perform an act to promote, manage, establish, and carry on and to facilitate the promotion, management, establishment, and carrying on of said unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3).

3. It was a further part and an object of the conspiracy that MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," and TANYA HOLLANDER, a/k/a "Tania Hollander," the defendants, and others known and unknown, unlawfully, willfully and knowingly would and did transport individuals in interstate and foreign commerce with intent that such individuals engage in prostitution, and in sexual activity for which a person can be charged with a criminal offense, in violation of Title 18, United States Code, Section 2421.

4. It was a further part and an object of the conspiracy that MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," and TANYA HOLLANDER, a/k/a "Tania Hollander," the defendants, and others known and unknown, unlawfully, willfully and knowingly would and did persuade, induce, entice, and coerce individuals to travel in interstate and foreign commerce to engage in prostitution and in sexual activity for which a person can be charged with a criminal offense, in violation of Title 18, United States Code, Section 2422(a).

Overt Acts

5. In furtherance of said conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. From in or about December 2004 through in or about March 2008, MARK BRENER, a/k/a "Michael," and CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendants, controlled a website

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located at URL www.emperorsclubvip.com. that included photographs of prostitutes' bodies, with their heads hidden, along with hourly rates for different categories of prostitutes;

b. From in or about December 2004 through in or about at least January 2008, MARK BRENER, a/k/a "Michael," and CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendants, received applications from women seeking to work as prostitutes with their prostitution business (hereinafter, the "Emperors Club") at various e-mail accounts;

c. On or about January 9, 2008, MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," and TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendants, spoke over the telephone about offering the Emperors Club's clients the opportunity to exercise a "buyout clause," which would permit clients to purchase direct access to one of the Emperors Club's prostitutes without having to contact the agency;

d. On or about January 15, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke with a client of the Emperors Club over the telephone about arranging for a prostitute to come to his room at a hotel in New York, New York;

e. On or about January 15, 2008, a prostitute working with the Emperors Club went to a client's hotel in New York, New York;

f. On or about January 18, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke over the telephone with a new prostitute working with the Emperors Club who told LEWIS that she had never "done anything like this before" and was a "little bit nervous about it";

g. On or about January 18, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, sent an e-mail to a potential prostitute asking her to send photographs of herself to SUWAL;

h. On or about January 22, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, told an Emperors Club client that he should not be concerned about sending a wire transfer to the Emperors Club because the wire would be sent to "QAT Consulting" so it would show up "like as a business transaction";

i. On or about January 24, 2008, a prostitute working with the Emperors Club went to a hotel in Los Angeles,

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California;

j. On or about January 24, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, received an e-mail from a potential prostitute declining to work for the Emperors Club in part because her friend had to have sex with a client "twice in an hour";

k. On or about January 24, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, sent an e-mail to TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, attaching a list of the aliases used by more than 50 prostitutes working with the Emperors Club in, among other places, New York, New York; Los Angeles, California; Miami, Florida; London, England; and Paris, France;

l. On or about January 24, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, sent an e-mail to a prostitute working with the Emperors Club and asked if she would be available on February 11, 2008, in Europe for an extended prostitution date with a client to cost $25,000 or more.

m. On or about January 26, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke with a client of the Emperors Club over the telephone about arranging for a prostitute to come to his room at a hotel in Los Angeles, California;

n. On or about January 27, 2008, a prostitute working with the Emperors Club went to a client's hotel in Los Angeles, California;

o. On or about January 27, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke with an Emperors Club client over the telephone who asked LEWIS whether the QAT consulting company could be traced because he had heard of agencies like the Emperors Club getting "busted";

p. On or about January 28, 2008, MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," and TANYA HOLLANDER, a/k/a "Tania Hollander," the defendants, met in the vicinity of Grand Central Terminal in New York, New York;

q. On or about January 28, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke with an Emperors Club client over the telephone about arranging for a prostitute to travel from New York to Washington, D.C., to his hotel;

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r. On or about January 30, 2008, MARK BRENER, a/k/a "Michael," CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," and TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendants, spoke over the telephone regarding problems with one of the Emperors Club's prostitutes who they believed might be abusing drugs;

s. On or about January 30, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, sent TANYA HOLLANDER, a/k/a "Tania Hollander," the defendant, a text message over the telephone asking HOLLANDER to contact an Emperors Club client to arrange an appointment with an Emperors Club prostitute in New York on February 1, 2008;

t. On or about January 30, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, sent TANYA HOLLANDER, a/k/a "Tania Hollander," the defendant, a text message over the telephone asking HOLLANDER to send two particular prostitutes on dates with Emperors Club clients in New York if possible, and HOLLANDER agreed;

u. On or about January 31, 2008, TANYA HOLLANDER, a/k/a "Tania Hollander," the defendant, sent CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, a text message over the telephone informing SUWAL that she had scheduled a date for an Emperors Club client with an Emperors Club prostitute in Europe;

[redacted]. On or about February 7, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," and TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendants, spoke over the telephone about the fact that an Emperors Club client had complained that one of their prostitutes was "more sex than sexy";

w. On or about February 11, 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," and TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendants, communicated via text message about the fact that the three-day rates for two of the Emperors Club prostitutes were $50,000 and $35,000, respectively;

x. On or about February 12, 2008, TEMEKA RACHELLE LEWIS, a/k/a "Rachelle," the defendant, spoke with an Emperors Club client over the telephone about arranging for a prostitute to travel from New York to Washington, D.C.; and

y. On or about February 13, 2008, an Emperors Club prostitute traveled from New York, New York, to a hotel in Washington, D.C.

(Title 18, United States Code, Section 371.)

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COUNT TWO

6. From in or about December 2004, up through and including in or about March 2008, in the Southern District of New York and elsewhere, MARK BRENER, a/k/a "Michael," and CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendants, and others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to commit an offense against the United States, to wit, to violate Title 18, United States Code, Section 1956.

7. It was a part and an object of the conspiracy that MARK BRENER, a/k/a "Michael," and CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendants, and others known and unknown, in an offense involving and affecting interstate and foreign commerce, knowing that the property involved in certain financial transactions represented the proceeds of some form of unlawful activity, unlawfully, willfully, and knowingly would and did conduct such financial transactions, which in fact involved the proceeds of specified unlawful activity, to wit, the use of facilities in interstate commerce with the intent to promote, manage, establish, and carry on, and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit, a business involving prostitution offenses in violation of applicable State law, in violation of Title 18, United States Code, Section 1952(a)(3); interstate transportation of individuals to engage in prostitution, in violation of Title 18, United States Code, Section 2421; and persuasion of individuals to travel in interstate and foreign commerce to engage in prostitution, in violation of Title 18, United States Code, Section 2422(a), (a) with the intent to promote the carrying on of specified unlawful activity, and (b) knowing that the transactions were designed in whole and in part to conceal and disguise the nature, the location, the source, the ownership, and the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i).

Overt Acts

8. In furtherance of the conspiracy and to effect the illegal objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. In or about December 10, 2004, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, opened a bank account in the name of "QAT Consulting Group, Inc.";

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b. In or about November 30, 2006, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, opened a bank account in the name of "QAT International, Inc.";

c. From in or about December 2004 to in or about January 2008, MARK BRENER, a/k/a "Michael," and CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendants, received more than $1 million in proceeds from the Emperors Club prostitution business in bank accounts in the names of "QAT Consulting Group, Inc.," and "QAT International, Inc.";

d. From in or about December 2004 to in or about January 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, wrote more than $100,000 in checks to cash from bank accounts in the names of "QAT Consulting Group, Inc.," and "QAT International, Inc.";

e. From in or about December 2004 to in or about January 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, wrote more than $39,000 in checks to Protech Consultants, a company whose bank account MARK BRENER, a/k/a "Michael," the defendant, controlled; and

f. From in or about December 2004 to in or about January 2008, CECIL SUWAL, a/k/a "Katie," a/k/a "Kate," the defendant, wrote checks and sent wire transfers totaling more than $400,000 from bank accounts in the name of "QAT Consulting Group, Inc.," and "QAT International, Inc.," to more than 50 prostitutes working with the Emperors Club in the United States and Europe.

(Title 18, United States Code, Section 1956(h).)

9. The bases for my knowledge and for the foregoing charges are, in part, set forth in the attached Affidavit of Kenneth Hosey in support of the Application for Arrest Warrants, Search Warrants, and Seizure Warrants, which is incorporated by reference herein.

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WHEREFORE, deponent prays that warrants be issued for the arrests of the above-named defendants so that they may be imprisoned or bailed, as the case may be.

KENNETH HOSEY
Special Agent
Federal Bureau of Investigation

Sworn to before me this
5 day of March, 2008.

/s/ Ronald L. Ellis
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

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McAllister Lighterage Line, Inc., is concerned. Its appeal has been discontinued in accordance with a stipulation and it will not be mentioned further.

Maritime had made a contract with Lorentzen to remove and dispose of the sand ballast on the Emma Bakke and had sublet the disposal of the ballast to Seaboard which had chartered the scow to use in so doing. Maritime did the work of loading the scow with the sand ballast from the motorship, by dumping it from a tub into piles on the scow.

Lorentzen in the second action sued Maritime and Seaboard and the scow, which was claimed by Seaboard, to recover for the damage to the motorship. From an interlocutory decree in the first suit in favor of the scow owner and against Lorentzen and Maritime jointly and primarily and against Seaboard secondarily for the damage to the scow, Lorentzen has appealed and Terminal has filed cross-assignments of error. From a final decree dismissing the libel in the second action on the merits but without costs to Maritime, Lorentzen has appealed.

There was ample evidence to support the findings of the trial court to the following effect. The scow was seaworthy and it capsized because of the negligence of Maritime in loading the sand in such piles as it did and in failing to come to the scow's assistance after the sand loaded in piles amidship from fore to aft had split and caused the scow to list toward the motorship, where she hung on her lines for an hour or so before she turned over. The motorship was negligent in allowing water to run upon the piles of sand from the refrigerator and toilet discharge pipes on the ship. Wooden covers to deflect such water away from the scow had been put over the ends of those pipes by the ship but had been displaced during the loading of the scow or when she was shifted by Maritime and the ship took no precautions other than the putting on of the covers. We accept those findings.

[1, 2] The trial judge also found that the scow captain was not negligent in going below to rest a while before the scow began to list and in remaining below until she did list. While the scow owner was bound to exercise through him due care for the "internal economy" of the scow, Dailey v. Carroll, 2 Cir., 248 F. 466, the burden was on the appellant and Maritime to show that it failed so to do. Central Vermont R. Co. v. White, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433, Ann.Cas.1916B, 252. On this record the determination of the trial judge has not been shown clearly erroneous and should not be disturbed.

[3] In the absence of proof that Seaboard Great Lakes Corporation, the charterer of the scow, was guilty of negligence which caused the damage to the motorship the cross libel of Lorentzen against it was properly dismissed. The Cullen No. 32, 2 Cir., 62 F.2d 68.

[4] But it was error to dismiss the libel of Lorentzen against Maritime whose negligence contributed to cause the damage to the motorship when the scow turned over and struck the ship. Maritime should have been held for half the damage to the ship. The Max Morris, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586.

The decree in the first suit is affirmed. That in the second suit is modified to allow the libellant to recover half damages from Maritime.

LA PAGE v. UNITED STATES.

No. 12863.

Circuit Court of Appeals, Eighth Circuit.

Jan. 10, 1945.

Rehearing Denied Jan. 29, 1945.

1. Statutes ⇐206

A statute should be construed so as to give effect to all of its language.

2. Statutes ⇐207

A broad statutory provision will not apply to a matter specifically dealt with in another part of same act.

3. Prostitution ⇐1

The statutory offense of causing transportation of a woman in interstate commerce for immoral purposes and the offense of inducing a woman to go in interstate commerce on a common carrier for immoral purposes are separate crimes. White Slave Traffic Act §§ 2, 3, 18 U.S.C.A. §§ 398, 399.

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4. Criminal ⇐196

The test of difference in similar crimes is that there must be a difference in the evidence necessary to establish particular crime from that required to establish the other crime.

5. Prostitution ⇐4

Proof that woman made trip in interstate commerce on common carrier following telephone call by defendant requesting woman to return to defendant's house of prostitution, though it might have supported conviction of offense of "inducing" woman to go in interstate commerce on a common carrier for immoral purposes, was not sufficient to support conviction of offense of "causing" woman to be transported in interstate commerce for immoral purposes. White Slave Traffic Act §§ 2, 3, 18 U.S.C.A. §§ 398, 399.

See Words and Phrases, Permanent Edition, for all other definitions of "Causing" and "Inducing".

SANBORN, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Gunnar H. Nordbye, Judge.

Lucille La Page, alias Lulu Page, was convicted of violating White Slave Traffic Act, 18 U.S.C.A. § 397 et seq., and she appeals.

Reversed and remanded with directions.

A. M. Cary, of Minneapolis, Minn. (Mark McCabe, of Minneapolis, Minn., on the brief) for appellant.

John [illegible]. Graff, Asst. U. S. Atty., of St. Paul, Minn. (Victor E. Anderson, U. S. Atty., of St. Paul, Minn., on the brief), for appellee.

Before STONE, SANBORN, and THOMAS, Circuit Judges.

STONE, Circuit Judge.

This is an appeal from a conviction for violation of the White Slave Traffic Act, 18 U.S.C.A. § 397 et seq.

Appellant urges here three claimed errors: (1) Improper restriction of cross-examination of a witness; (2) error in the charge to the jury, and (3) insufficiency of the evidence to support the crime set forth in the indictment. We have examined the points as to restriction of cross-examination and as to the charge to the jury and find no merit in either.

The serious matter is the sufficiency of the evidence to sustain the crime charged in the indictment. The indictment is in one count under Section 2 of the Act, 36 Stat. 825, U.S.C.A. Title 18, § 398, and in the words of that section, charges that appellant "did cause to be transported and aid and assist in obtaining transportation in interstate commerce" of Dora Thomas "for the purpose of prostitution, debauchery, and other immoral purposes."

The evidence established that Dora Thomas (who was an inmate of a house of prostitution operated by appellant at Fargo, North Dakota) had gone to Minneapolis, Minnesota, for a vacation; that appellant telephoned her, one evening, to return as "one of her girls was leaving" and she would be expected early next morning; that it was understood by both women that Dora Thomas would return to Fargo next day by train; and that she did so return. Baldly, the evidence is that Dora Thomas made this interstate journey at her own expense because of appellant's telephone request and that both women understood the immoral purpose for which the trip was to be taken. Since there was no evidence that appellant gave any aid or assistance in obtaining the transportation, the sufficiency of the proof depends upon whether it shows that appellant "*did cause* [Dora Thomas] to be transported" (italics added) within the meaning of section 2 of the Act.

Appellant contends that where, as here, the only act of accused is that of persuading or inducing an interstate trip by common carrier for immoral purposes, such act is not *causing* such trip within the meaning of section 2 but is, if any crime, the one stated in section 3 of the Act, U.S.C.A. Title 18, § 399.

The pertinent language in the two sections is: Section 2. "Any person who shall knowingly * * * cause to be transported * * * in interstate * * * commerce * * * any woman or girl for the purpose of prostitution"; and section 3, "Any person who shall knowingly persuade, induce * * * any woman or girl to go from one place to another in interstate * * * commerce * * * for the purpose of prostitution." Since, generally speaking, "'cause' is a word of very broad import" (United States v. Kendrskey, 243

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U.S. 440, 443, 37 S.Ct. 438, 439, 61 L.Ed. 836)[1] and since to "persuade" or to "induce"[2] might very well come within a broad definition of "cause", the contention is really that "cause" as used in section 2 is limited by exclusion of the means of bringing about specifically set forth in section 3.

[1-3] In construing these provisions of the two sections, we start with the rules that a statute should be construed so as to give effect to all of its language[3] and that a broad statutory provision will not apply to a matter specifically dealt with in another part of the same Act.[4] Also, it has been determined that the two sections cover separate crimes.[5] One distinction between the two sections has, under some facts, been based upon the necessity of use of a common carrier in section 3, § 399, U.S.C.A., Title 18, while no such necessity exists in section 2, § 398, U.S.C.A. Title 18 (Coltabellotta [redacted] United States, 2 Cir., 45 F.2d 117, 119; Blain [redacted] United States, 8 Cir., 22 F.2d 393, 395) but the sections are distinct also irrespective of the common carrier feature and this distinction is between "causing to be transported", etc., under section 2, and "persuading, inducing" etc., to be transported under section 3 (see the Kavalin and Roark cases in note 5). The only way to make that distinction effective and to preserve any effect to this part of section 3 is to eliminate as *causes* for transportation under section 2 the kinds of causation covered in section 3 by the expressions "persuade, induce, entice, or coerce."

Appellee relies on decisions by this Court as follows: Schrader [redacted] United States, 8 Cir., 94 F.2d 926; Gillenwaters [redacted] Biddle, 8 Cir., 18 F.2d 206; Carey [redacted] United States, 8 Cir., 265 F. 515, and Huffman [redacted] United States, 8 Cir., 259 F. 35. The Schrader case conviction was sustained solely by an application of the "aiding and abetting" statute (Title 18 U.S.C.A. § 550). We need not determine whether that decision should be followed since the fact situation here does not admit of application of section 550 for the reason that appellant here was the only person involved in this unlawful transportation. However, it is not amiss to state that the effect of section 399 upon application of section 550 or upon section 398 was not brought to our atten-

[1] Webster's New International Dictionary, 2nd ed., defines the verb "cause" as being "to be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make."

Compare judicially determined meanings in various legal situations as shown in 6 Words and Phrases, Permanent Edition, p. 341 et seq.

[2] Webster's New International Dictionary, 2nd ed., defines the verbs "induce" and "persuade" as follows: induce is "to lead on; to influence; to prevail on; to move by persuasion or influence"; persuade is "1. to induce (one) by argument, entreaty, or expostulation into a determination, decision, conclusion, belief, or the like; to win over by an appeal to one's reason and feelings, as into doing or believing something; to bring (oneself or another) to belief, certainty, or conviction; to argue into an opinion or procedure; as, he *persuades* his friend to study law, that a doctrine is erroneous, into paying his debts, or by many arguments; to *persuade* oneself that all is well; 2. to use persuasion upon; to plead with; urge; 3. * * * to bring about, by argument and persuasion, the doing, practicing, or believing of; to commend, recommend, counsel, or advise (something to be done or proposed for belief)."

Compare legal definitions in 21 Words and Phrases, Permanent Edition, p. 220 and pocket part and 32 Words and Phrases, Permanent Edition, p. 463 and pocket part.

[3] In Ex parte Public National Bank of New York, 278 U.S. 101, 104, 49 S.Ct. 43, 44, 73 L.Ed. 202, is stated: "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacou's Abridgment, § 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."' Washington Market Co. v. Hoffman, 101 U.S. 112, 115, 25 L.Ed. 782."

[4] D. Ginsberg & Sons Inc., [redacted] Popkin, 285 U.S. 204, 208, 52 S.Ct. 322, 76 L.Ed. 704; Peck v. Jenness, 7 How. 612, 622, 12 L.Ed. 841.

[5] United States [redacted] Saledonia, 2 Cir., 93 F.2d 302, 303, 304; Kavalin v. White, 10 Cir., 44 F.2d 49, 51; Roark v. United States, 8 Cir., 17 F.2d 570, 573, 51 A.L.R. 870; and see United States v. Barton, 2 Cir., 134 F.2d 484.

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tion or considered in the Schrader case.[6] The Carey case was a general sentence of three months on four counts of indictment —two counts were for furnishing transportation on two trips and the other two counts for "persuading" the victim to make these trips. While the judgment was affirmed, there was no consideration of the point involved here. The Huffman case was conviction on count one and acquittal by verdict on counts two, three and four of an indictment. Count one was for causing a woman to be transported on a trip under section 2; the second count was identical covering a different trip; count three was for persuading, inducing and enticing (under section 3) the same woman on the first trip; and count four was identical covering the other trip. A point presented and determined was whether the acquittal on counts two, three and four was inconsistent with the conviction on count one. The judgment was affirmed. The ground for affirmance is not as distinctly stated as might be (see pages 40–42 of 259 F.) but may fairly be said to be that the several counts pleaded the same transaction in different manner or means of its commission so as "to avoid at the trial an acquittal by reason of any unforeseen lack of harmony between the allegations and the proofs" (page 40 of 259 F.). Also, reliance is placed, by appellee, on Johnson v. United States, 7 Cir., 215 F. 679, L.R.A. 1915A, 862, but this case is not pertinent.

[4, 5] The only one of the above cases which bears upon the point before us is the Huffman case. If that case is to be understood as holding that to "induce," etc., transportation under section 3 is within to "cause" to be transported under section 2, then the authority of that case is materially weakened, if not destroyed, by our later case of Roark v. United States, 8 Cir., 17 F.2d 570, 573, 51 A.L.R. 870. We think the Huffman case should no longer be followed to the effect that to "induce," etc., under section 3 is to "cause" under section 2. Where the accused does no more to "cause", i. e., to bring about, the transportation than is shown here, the crime is a violation of section 3 for *persuading* or *inducing* and is not a violation of section 2 for *causing* unlawful transportation. The test of difference in similar crimes is that there must be a difference in the evidence necessary to establish the particular crime from that required to establish the other crime. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 86 L.Ed. 306; Gillenwaters v. Biddle, 8 Cir., 18 F.2d 206, 208. Here all of the essential evidence is necessary to establish a crime under section 3[7] and there is no further evidence. In short, if this evidence establishes also a crime under section 2, it must follow that any evidence sufficient to prove a crime under section 3 is likewise sufficient to prove a crime under section 2. Since section 3 is of similar and of narrower application than section 2, the inevitable result is that all meaning of section 3 is included in section 2 and section 3 states no crime not included in section 2. This is to strike out section 3 and give it no effect whatever. We think it is not our province thus to nullify a portion of an Act, by statutory construction, when it is possible to reconcile the two sections giving each a separate meaning and effect and thereby preserve both sections of the Act.

In view of our foregoing determination, it is not necessary to examine the further contention of appellant that the judgment should be reversed under authority of Mortensen v. United States, 322 U.S. 369, 64 S.Ct. 1037.

The judgment is reversed and the case remanded with directions to enter judgment of acquittal.

SANBORN, Circuit Judge (dissenting).

Since the evidence shows that the appellant knowingly brought about the return of Dora Thomas from Minneapolis, Minnesota, to Fargo, North Dakota, for the purpose of prostitution, and therefore caused her to be transported in interstate commerce, I think the conviction of the appellant under section 2 of the White Slave Traffic Act should be sustained. The Supreme Court has held that under that section "transportation of a woman or girl whether with or without her consent, or causing or aiding it, or furthering it in any of the specified ways, are the acts pun-

[6] Compare Gebardi v. United States, 287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206, 84 A.L.R. 370.

[7] For cases with somewhat similar fact situations where court held violation of section 399 see Blackstock v. United States, 8 Cir., 261 F. 150, certiorari denied 254 U.S. 634, 41 S.Ct. 8, 65 L.Ed. 449; Gillette v. United States, 8 Cir., 236 F. 215; United States v. Barton, 2 Cir., 134 F.2d 484; Simpson v. United States, 9 Cir., 245 F. 278, 280.

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ished, when done with a purpose which is immoral within the meaning of the law." Gebardi v. United States, 287 U.S. 112, 118, 53 S.Ct. 35, 36, 77 L.Ed. 206, 84 A.L.R. 370. The language of section 2 of the Act should be given its full meaning, since that construction supports the policy and purposes of the enactment. Donnelley v. United States, 276 U.S. 505, 512, 48 S.Ct. 400, 72 L.Ed. 676; Wilson v. United States, 8 Cir., 77 F.2d 236, 239, 240.

The verb "cause" as used in section 2 is entitled to the meaning ascribed to it by the trial court. This is indicated by the decisions of this Court in Huffman v. United States, 8 Cir., 259 F. 35, 38, and Demolli v. United States, 144 F. 363, 366, 6 L.R.A.,N.S., 424, 7 Ann.Cas. 121; by the decision of the Circuit Court of Appeals of the Second Circuit in Reed v. United States, 2 Cir., 96 F.2d 785, 787, certiorari denied 305 U.S. 612, 59 S.Ct. 71, 83 L.Ed. 399; and by the ruling of the Supreme Court in United States v. Kenofskey, 243 U.S. 440, 443, 37 S.Ct. 438, 61 L.Ed. 836.

The fact that the evidence shows that what was done by the appellant was also an offense under section 3 of the Act, which section is "directed toward the persuasion, inducement, enticement, or coercion of the prohibited transportation, * * *", Gebardi v. United States, supra, page 119 of 287 U.S., page 36 of 53 S.Ct., 77 L.Ed. 206, 84 A.L.R. 370, I regard as having no substantial bearing on the question of appellant's guilt under section 2 of the Act.

I think there is no conflict between Huffman v. United States, supra, 259 F. 35, and Roark v. United States, 8 Cir., 17 F.2d 570, 51 A.L.R. 870. Roark entered a plea of guilty to an indictment containing four counts. Two of the counts charged him with violating section 2 of the Act, and the other two counts charged him with violating section 3. Roark contended that, since the indictment showed that all of the counts were based upon one transportation of one woman, the indictment charged but one offense. We thought that a person could be guilty of causing a woman to be transported in violation of section 2 and also of inducing her to be transported in violation of section 3. We said (page 573 of 17 F.2d): "It would not require the same evidence to prove that a person knowingly transported or caused to be transported a woman in interstate commerce, and to prove that he induced the woman to go in such commerce. The acts may be separate and distinct." We therefore held that, for purposes of sentence, the four counts of the indictment charged two offenses, one under section 2, and the other under section 3. The opinion in the Roark case carries no implication that if a person causes the unlawful transportation of a woman by persuasion or the offering of inducements, he may not be convicted under section 2 of the Act. It seems to me that the proper inference to be drawn from that case is that such a person may be convicted under either or both sections. Compare Reed v. United States, supra, page 787 of 96 F.2d.

Sections 2 and 3 of the Act are obviously much alike and are aimed at the same evil. A violation of one section is frequently and perhaps usually a violation of the other. To my mind, that is an added reason why neither section should be given a restricted meaning or weakened in any way by construction. I think that the evidence in this case shows that the appellant violated both sections 2 and 3 of the Act. I have no doubt that her conviction under section 2 was proper.

The case of Mortensen v. United States, 322 U.S. 369, 64 S.Ct. 1037, has no application to this case. In the Mortensen case the Supreme Court held that there was no evidence that the transportation was for any immoral purpose (page 374 of 322 U. S., page 1040 of 64 S.Ct.). In the instant case the evidence shows that the transportation of Dora Thomas from Minneapolis to Fargo was for an immoral purpose.

I would affirm the judgment appealed from.

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ages. Generally, the intentional doing of a wrongful act with full knowledge of its character, and without cause or excuse, is malicious and warrants an award of exemplary damages.

Id. 468 P.2d at 131. *See Ford ▌ Guarantee Abstract and Title Co.*, 220 Kan. 244, 553 P.2d 254, 268–69 (1976); *Watkins ▌ Layton*, 182 Kan. 702, 324 P.2d 130, 135 (1958). It is apparent from the above-quoted language that "punitive damage malice" under Kansas law contemplates the same reckless or intentional acts reflected in the *New York Times* standard for "First Amendment malice" and its progeny, including *Schulze*.

[19] Lastly, ARA asserts the district court erred in finding that its agent Coleman's statements were not qualifiedly privileged. Whether the defense is available is ordinarily a question of law for the court. *Munsell, supra*, 494 P.2d at 1073.

> The essential elements of a conditionally privileged communication may . . . be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.

Senogles ▌ Security Benefit Life Insurance Co., 217 Kan. 438, 536 P.2d 1358, 1363 (1975). *See Bradford, supra* 548 P.2d at 1229.

[20, 21] Preliminarily, even if we disagreed with the district court, the error would be harmless, for in awarding punitive damages the jury found that ARA acted with the requisite malice to overcome a qualified privilege. *See Schulze, supra* 545 P.2d at 399. In any event, ARA cannot claim qualified privilege here. The only reasonable inference from the evidence in the case was that Coleman's statements were made in an effort to further the business interests of ARA by securing advantage over a competitor through injury to the competitor's reputation. ARA's pecuniary interest in this context is not an interest entitled to the protection of qualified privilege. *See Aetna Life Insurance ▌ Mutual Benefit Health and Accident Assoc.*, 82 F.2d 115, 119 (8th Cir. 1936); Restatement (Second) of Torts § 594, Comment g (1976); 50 Am.Jur.2d § 198, at 703. Moreover, the fact that Coleman waited until Mid-America's agent had departed the meeting at which the bids were awarded before impugning Mid-America's ability to perform the contract is persuasive evidence that publication was not made in good faith or in a proper manner. The district court did not err in ruling against qualified privilege.

Because the district court's instructions were not plainly erroneous, and no other error appearing, we affirm.

Affirmed.

UNITED STATES of America, Appellee,

v.

Lloyd M. PELTON, Appellant.

UNITED STATES of America, Appellee,

▌.

Jacqueline RICH, Appellant.

Nos. 77-1682, 77-1695.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 9, 1978.

Decided June 7, 1978.

Rehearing and Rehearing En Banc Denied in No. 77-1695 July 3 and in No. 77-1682 July 24, 1978.

Defendants were convicted in the United States District Court for the Eastern District of Missouri, H. Kenneth Wangelin, J., of violating the Mann Act, and they appealed. The Court of Appeals, Gibson, Chief Judge, held that: (1) evidence was sufficient to sustain convictions; (2) where tape recordings in Government's possession did not contain exculpatory evidence and

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Government made no direct or derivative use of tapes, trial court did not abuse its discretion in denying access to tapes; (3) evidence did not support assertion that Government denied access to prospective witnesses; (4) fact that attorney for grand jury witness had said he was going to advise witness not to testify was insufficient to establish unavailability of witness so as to authorize admission of witness' grand jury testimony; (5) motion for severance made prior to trial but not reviewed at close of Government's evidence or at conclusion of all evidence was waived, and (6) status of prostitution under Nevada law where woman was sent to engage in prostitution had no bearing on illegality of agreement to transport woman in interstate commerce for purposes of prostitution.

Affirmed.

1. Criminal Law ⇐586, 1151

Motion for continuance is addressed to sound discretion of trial court and refusal to grant continuance will be set aside only upon showing of clear abuse of discretion.

2. Criminal Law ⇐594(1)

Where defense counsel supported motion for continuance only with speculation that there might be out-of-state witnesses whom he had been unable to interview prior to trial because of personal time strictures, Government's opposition was based on fear that delay could lead to unavailability of important government witnesses who were then in protective custody and 20-day period from time of defendant's arrest to trial was adequate time for trial preparation, trial court did not abuse its discretion in refusing to grant continuance. 18 U.S.C.A. § 3161 et seq.

3. Criminal Law ⇐627.7(2)

Ordinarily, when defendant requests inspection of his or her statements which are in the possession, custody or control of Government, Government has duty of disclosure. Fed.Rules Crim.Proc. rule 16(a)(1)(A), 18 U.S.C.A.

4. Criminal Law ⇐627.5(2), 1166(1)

Discovery matters are committed to sound discretion of district court and an error in administering discovery rules is reversible only on a showing that error was prejudicial to defendant's substantive rights. Fed.Rules Crim.Proc. rule 16, 18 U.S.C.A.

5. Criminal Law ⇐627.8(4)

Ex parte proceeding was appropriate where Government's denial of defendant's request for tape recordings in Government's possession and Government's request for protective order were based upon concern for safety of persons cooperating on case whose identity would be revealed to defendant if she heard tape. Fed.Rules Crim. Proc. rule 16(d)(1), 18 U.S.C.A.

6. Criminal Law ⇐627.8(3)

Government which denied defendant's request for disclosure of tape recordings of her voice in Government's possession on ground of concern for safety of persons cooperating on case whose identity would be revealed to defendant if she heard tapes and which made ex parte presentation to court resulting in court's determination that tapes contained nothing exculpatory made sufficient showing for protective order. Fed.Rules Crim.Proc. rule 16(d)(1), 18 U.S.C.A.

7. Criminal Law ⇐627.5(2)

District court acted within its discretion in denying defendant access to tape recordings of her voice in Government's possession where tapes contained no exculpatory evidence and Government made no direct or derivative use of tapes. Fed.Rules Crim.Proc. rule 16(a)(1)(A), 18 U.S.C.A.

8. Criminal Law ⇐627.6(1)

Discovery of prospective witnesses is not required under rule authorizing discovery in criminal case. Fed.Rules Crim. Proc. rule 16(a), 18 U.S.C.A.

9. Criminal Law ⇐627.6(1)

Trial court did not abuse its discretion in refusing to order pretrial discovery of Government's witnesses. Fed.Rules Crim. Proc. rule 16(a), 18 U.S.C.A.

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10. Criminal Law ⇐700

Where defendant made no allegation whatsoever of contact between her employee and Government prior to trial and where Government denied having interviewed employee or even having known where she could be found and did not call employee as witness, there was no support for defendant's assertion of governmental concealment of employee-witness.

11. Criminal Law ⇐700

Government's indictment of witnesses did not establish Government's concealment of prospective witnesses as defendant contended.

12. Criminal Law ⇐666½

Where witness was placed in protective custody of Government due to incidents suggesting that her safety was in jeopardy, witness made personal choice not to speak with defendant prior to trial, witness was present on trial date and made available to defendant and defendant interviewed witness and decided not to call her, there was no concealment of witness by Government as defendant contended.

13. Criminal Law ⇐627.6(1)

Grand jury testimony is generally not discoverable on pretrial motion. 18 U.S.C.A. § 3500.

14. Criminal Law ⇐627.6(1)

If Government had called witness and she had testified, defendant would have been entitled to transcript of her grand jury testimony. 18 U.S.C.A. § 3500.

15. Criminal Law ⇐419(5)

Unavailability requirement of rule authorizing admission of hearsay statements of unavailable declarant places burden of producing unavailable declarant upon proponent of evidence. Federal Rules of Evidence, rules 804, 804(a)(1), 28 U.S.C.A.

16. Criminal Law ⇐542

That grand jury witness' attorney had said he was going to advise witness not to testify at defendant's trial was insufficient to establish unavailability of witness so as to authorize admission of transcript of her grand jury testimony. Federal Rules of Evidence, rules 804, 804(a)(1), 28 U.S.C.A.; U.S.C.A.Const. Amend. 5.

17. Criminal Law ⇐1144.13(3)

In considering contention that evidence was insufficient to support conviction, reviewing court must view evidence in light most favorable to Government.

18. Prostitution ⇐4

Evidence of female defendant's participation in plan for transportation of women to Chicago and Nevada for prostitution purposes was sufficient to sustain her conviction of violating Mann Act. 18 U.S.C.A. §§ 2421 et seq., 2422.

19. Constitutional Law ⇐42.3(1)

Male defendant lacked standing to attack Mann Act on basis that it violated and derogated right of females to seek legal employment. 18 U.S.C.A. §§ 2421, 2422.

20. Criminal Law ⇐897(1)

Where defendant filed pretrial motion for severance but did not renew motion at close of Government's evidence or at conclusion of all evidence, motion was waived.

21. Criminal Law ⇐1144.13(3, 5)

In analyzing contention that evidence was insufficient to sustain conviction, court would view evidence in light most favorable to Government and accept as established all reasonable inferences from evidence tending to support jury's verdict.

22. Criminal Law ⇐552(3), 561(1)

It is not necessary that evidence exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince jury beyond reasonable doubt that defendant is guilty; such standard also applies in cases where conviction rests on circumstantial evidence.

23. Criminal Law ⇐552(4)

Circumstantial evidence is intrinsically as probative as direct evidence for purposes of sustaining a conviction.

24. Conspiracy ⇐23

Offense of conspiracy consists of an agreement between conspirators to commit

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an offense attended by an act of one or more of conspirators to effect object of conspiracy.

25. Conspiracy ⇐24, 47(2)

Agreement between conspirators to commit an offense need not be express or formal and may be established by circumstantial evidence.

26. Conspiracy ⇐47(3)

Evidence regarding agreement between defendant and another person to send women to Nevada to work as prostitutes and to divide prostitutes' income was sufficient to sustain defendant's conviction of conspiracy to knowingly transport women in interstate commerce for purpose of prostitution in violation of Mann Act. 18 U.S.C.A. § 2421.

27. Prostitution ⇐1

Prohibition of Mann Act is not keyed to legality or illegality of prostitution under law of state where transportation ends. 18 U.S.C.A. § 2421 et seq.

28. Prostitution ⇐1

Status of prostitution under Nevada law had no bearing on illegality of agreement to send women to Nevada to work as prostitutes under the Mann Act. 18 U.S.C.A. § 2421.

29. Conspiracy ⇐38
Prostitution ⇐2

Consent is not a defense to charge of violating Mann Act or charge of conspiring to violate Mann Act. 18 U.S.C.A. §§ 2421, 2422.

30. Prostitution ⇐1

Woman's predisposition and willingness to go to Nevada to work as prostitute did not vitiate illegality of agreement to transport her for purposes of prostitution in violation of Mann Act. 18 U.S.C.A. §§ 2421, 2422.

31. Prostitution ⇐1

It is the inducement of transportation which is prohibited under section of Mann Act prohibiting inducement of a woman to be transported in interstate commerce for purposes of prostitution and not actual provision of that transportation. 18 U.S.C.A. § 2422.

32. Prostitution ⇐1

When an offer to travel interstate for purposes of prostitution elicits a positive response from woman to whom it is made, offer constitutes requisite inducement under Mann Act. 18 U.S.C.A. § 2422.

33. Prostitution ⇐4

Evidence that defendant made inducement sufficient to persuade woman to travel to Nevada to engage in prostitution was sufficient to sustain defendant's conviction of violating Mann Act by persuading, inducing and enticing woman to go in interstate commerce for purposes of prostitution, notwithstanding assertion that women was willing to go to Nevada to work as prostitute. 18 U.S.C.A. § 2422.

Claude Hanks, Clayton, Mo., Hanks Taylor & Suddarth, Clayton, Mo., filed brief, for appellant, Pelton.

Irl B. Baris, St. Louis, Mo., for appellant, Rich.

David M. Rosen, Asst. U. S. Atty., argued, Robert D. Kingsland, U. S. Atty., St. Louis, Mo., on brief, for appellee.

Before GIBSON, Chief Judge, and ROSS and WEBSTER,[1] Circuit Judges.

GIBSON, Chief Judge.

This case involves charged violations of the Mann Act arising out of certain interstate activities undertaken by a prostitution operation based in St. Louis, Missouri. In July 1977, the Government returned an eight-count indictment against Jacqueline "Pat" Rich, Lloyd Pelton and Ann Frazier.[2]

1. Prior to leaving this court to become Director of the Federal Bureau of Investigation, Judge Webster heard oral argument in this case, participated in the conference thereon, and concurred in the result.

2. Count 1 charged Rich and Frazier with conspiracy to knowingly transport women in interstate commerce for purposes of prostitution in violation of 18 U.S.C. § 2421. The overt acts offered in support of this conspiracy charge

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The first four counts of the indictment related to travel by prostitutes between St. Louis, Missouri, and Chicago, Illinois; the second four counts related to travel between St. Louis, Missouri, and Winnemucca, Nevada.

In late September 1976, Fred Coughlin, then a sales representative for a boat company in the St. Louis area, asked Rich to provide prostitutes for a forthcoming boat show in Chicago. Rich agreed to let Coughlin take two call girls whom she employed to Chicago to "work" the boat show. She then directed Kathleen Bray and Charlotte Anderson to drive to Chicago with Coughlin. She also arranged for the separate transportation to Chicago of Kathleen Waggoner, another call girl in her employ. All three women travelled to Chicago as arranged by Rich and worked as prostitutes at a boat show; while in Chicago they were managed pursuant to arrangements made by Rich. Bray became ill and returned to St. Louis earlier than the others, who returned at the conclusion of the boat show.

Upon Bray's return to St. Louis, plans were made for sending her and another call girl known as Georgia to work at Penny's Cozy Corner, a house of prostitution in Winnemucca, Nevada. According to Bray, she was present at Rich's apartment when Rich and Pelton made arrangements for this trip. Pelton called an acquaintance of his at Penny's Cozy Corner and arranged for Bray's stay there. It was agreed that he would receive $200 per girl for his placement services. Rich gave Bray $200 to buy clothes and $250 to buy an airplane ticket to Nevada and to pay for a doctor's examination and the accessories that she would need at Penny's Cozy Corner. Rich was to receive a percentage of the money which Bray earned in Nevada. Bray flew to Nevada and attempted to become licensed as a prostitute. Her application for a license was denied because she was under the age of eighteen, and she returned to St. Louis. Following Bray's return, Pelton and Rich made plans and arrangements, similar to those which they had made for her Nevada trip, for sending Shirley Dawson and Charlotte Anderson to Winnemucca. Pursuant to these arrangements, Dawson and Anderson travelled to Winnemucca in October 1976, and began to work at Penny's Cozy Corner. They quickly discovered that employment in Nevada was not as lucrative as they had imagined it would be and they returned to St. Louis after only a short tenure in Winnemucca.

Rich and Pelton were tried jointly to a jury on the charges arising from the aforesaid events.[3] Rich, who was charged in all eight counts, was found guilty on Counts I–VII and acquitted on Count VIII (Nevada trip of Anderson). She received an aggregate sentence of ten years' imprisonment.[4]

were alleged to have occurred on September 29 and 30, 1976, in connection with the transportation of three call girls to Chicago to "work" a boat show. Three of the overt acts alleged in Count I formed the basis of the substantive violations of 18 U.S.C. § 2421 with which Rich alone was charged in Counts II, III and IV. Count II charged Rich with a § 2421 violation with regard to Kathleen Waggoner, a/k/a "Monica"; Count III charged her with a similar violation with regard to Kathleen Bray, a/k/a "Baby"; and Count IV related to the interstate transportation of Charlotte Anderson, a/k/a "Frosty," in violation of § 2421.

Count [redacted] charged Rich and Pelton with conspiracy to knowingly transport women in interstate commerce for purposes of prostitution in violation of 18 U.S.C. § 2421. The overt acts offered in support of this conspiracy charge related to the transportation of three women, Shirley Dawson, Kathleen Bray and Charlotte Anderson, to Winnemucca, Nevada, for purposes of prostitution. Count [redacted] charged Rich and Pelton with violating 18 U.S.C. § 2422 by persuading, inducing and enticing Shirley Dawson to go to Winnemucca to act as a prostitute and by causing her to be transported there as a passenger upon the line and route of a common carrier in interstate commerce. Counts VII and VIII charged Rich and Pelton with similar violations with regard to Kathleen Bray and Charlotte Anderson, respectively.

3. Frazier indicated a willingness to dispose of her case in Chicago under the provisions of Fed.R.Crim.P. 20; she was not tried with Rich and Pelton.

4. Rich was sentenced to a five-year term of imprisonment on each of her seven convictions.

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Pelton, who was charged only in Counts [redacted]-VIII, was found guilty on Counts [redacted] (conspiracy involving trips to Nevada) and VII (Nevada trip of Bray) and acquitted on Counts VI and VIII (Nevada trips of Dawson and Anderson respectively). He received two concurrent sentences of three years' imprisonment.

Both defendants appeal. We first consider appellant Rich's contentions.

Continuance

Rich was arrested on July 11, 1977, and arraigned on July 18. At her arraignment, the District Court[5] set an August 1 trial date, despite protestations by Rich's counsel that this date would be inconvenient to him. On July 27, Pelton, who had also been given an August 1 trial date when he was arraigned on July 11, filed a motion for a continuance and the Government filed a written response requesting a denial of the motion. On July 28, Rich moved for a continuance.

When the case was called for trial on the morning of August 1, the District Court considered defendants' continuance motions. In support of their motions, both counsel asserted personal exigencies that had curtailed their pretrial preparation. Government counsel expressed opposition to the granting of a continuance, primarily because of his fear that delay of the trial could lead to the unavailability of several important Government witnesses who were then in protective custody. The District Court denied defendants' continuance motions, and on the afternoon of August 1, voir dire examination of potential jurors was conducted, a jury was impanelled and trial was commenced. Rich contends that the trial court's refusal to grant a continuance was erroneous because it precluded her attorney from making adequate preparation and investigation for her defense.

She received concurrent terms of imprisonment on Counts I–IV. Her sentences on Counts VII run concurrently with one another, but consecutively to the sentences in Counts I–IV.

5. The Honorable H. Kenneth Wangelin, United States District Judge for the Eastern District of Missouri.

[1, 2] We note initially that a review of the trial transcript shows that Rich was vigorously defended at trial and belies the suggestion that counsel had less than adequate time to prepare for trial. The twenty-day period from time of arrest to trial appears adequate, particularly in view of the strictures of the Speedy Trial Act. Moreover, a motion for continuance is addressed to the sound discretion of the trial court, and a refusal to grant a continuance will be set aside only upon a showing of a clear abuse of discretion. *United States* [redacted] *Jackson*, 549 F.2d 517, 528 (8th Cir.), *cert. denied*, 430 U.S. 985, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977); *United States* [redacted] *Webb*, 533 F.2d 391, 395 (8th Cir. 1976). Counsel for Rich supported his motion for continuance with the speculation that there might be witnesses in Chicago and Nevada whom he had been unable to interview prior to trial because of the personal time strictures of his life. In opposing a continuance, the Government presented specific and cogent reasons which went to the very viability of the prosecution. On these facts, we are unable to say that the trial court abused its discretion in refusing to grant a continuance.

Discovery of tape recordings in the Government's possession

[3] Discovery of evidence in criminal cases is governed by the provisions of Rule 16 of the Federal Rules of Criminal Procedure. Prior to trial, Rich made a request under Rule 16 for tape recordings of her voice which were in the Government's possession. Ordinarily, when a defendant requests inspection of his or her statements which are in the possession, custody or control of the Government, the Government has a duty of disclosure under Rule 16(a)(1)(A).[6] In the instant case, the

6. Rule 16(a)(1)(A) provides in pertinent part: Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government * * *.

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Government declined to disclose to Rich the tape recordings of her voice which were in its possession. Motivated by concern for the safety of persons cooperating on the case, whose identity would be revealed to Rich if she heard the tapes, the Government requested a protective order under Rule 16(d)(1), which provides:

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

In support of its request, the Government made an ex parte presentation to the court. Upon listening to the tapes, the trial judge concluded that they contained nothing exculpatory of Rich. He then made the tapes a part of the record and issued a Rule 16(d)(1) order sealing them. The tapes were not used at trial. The Government also assures us that it made no use at trial of any evidence derived from the tapes.

[4] Rich contends, nonetheless, that the court erred in denying her access to the recordings of her voice. Discovery matters are committed to the sound discretion of the district court and an error in administering the discovery rules is reversible only on a showing that the error was prejudicial to the substantial rights of the defendant. *United States v. Crow Dog*, 532 F.2d 1182, 1189 (8th Cir. 1976), *cert. denied*, 430 U.S. 929, 97 S.Ct. 1547, 51 L.Ed.2d 772 (1977); *United States v. Cole*, 453 F.2d 902, 904–05 (8th Cir.), *cert. denied*, 406 U.S. 922, 92 S.Ct. 1788, 32 L.Ed.2d 122 (1972). Given the trial court's finding that the tapes contained no exculpatory evidence and the fact that the Government made no direct or derivative use of the tapes, we find it difficult to understand how Rich could have been prejudiced by being denied access to the tapes. Moreover, a review of the record reveals that the protective order at issue here was entered in conformance with Rule 16(d)(1), which specifically authorizes ex parte proceedings. The purpose of the order sought here was to protect the identity of persons cooperating on the case. An adversary proceeding would have defeated the very purpose of the requested order by revealing their identities to Rich.

[5–7] A review of the record, which includes the sealed tapes at issue here, convinces us that an ex parte proceeding was appropriate on the facts of this case and that the Government made a sufficient showing for a protective order under Rule 16(d)(1). The District Court acted well within its discretion and in full compliance with Rule 16(d)(1) in denying Rich access to the tapes in the Government's possession. Furthermore, Rich has made no showing that this order prejudiced her substantial rights. Her contention regarding the Rule 16(d)(1) order is without merit.

Pretrial discovery of Government witnesses

Prior to trial, defendant Rich moved to compel the Government "to make witnesses and statements" available. Etta Williams, a/k/a "Agnes Brittain," an unindicted coconspirator in Count I, was the only prospective Government witness identified in the motion. The District Court denied the motion and refused to order pretrial discovery of the Government's witnesses.[7] Rich contends that the trial court erred in refusing to order pretrial discovery of the Government's witnesses. She also suggests that the Government interfered with her investigation of the case by concealing prospective witnesses from her.

7. In denying defendants' motion for pretrial discovery of witnesses, the district judge made it clear that his ruling had no bearing whatsoever on the Government's duty under 18 U.S.C. § 3500 to provide defendants with statements of witnesses after they had testified on direct examination at trial. It is clear that the Government complied fully with § 3500.

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[8, 9] Rich's attack on the District Court's refusal to order pretrial discovery of witnesses is wholly lacking in merit. Discovery of prospective witnesses is not required under Fed.R.Crim.P. 16(a), *United States v. Krohn*, 558 F.2d 390, 394 (8th Cir.), *cert. denied*, 434 U.S. 868, 98 S.Ct. 207, 54 L.Ed.2d 145 (1977); *United States v. Rogers*, 549 F.2d 490, 494 (8th Cir. 1976), *cert. denied*, 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977), and we can find no abuse of discretion in the trial court's refusal to order this pretrial discovery. Moreover, there is no support in the record for the suggestion that the Government impeded Rich in the investigation of her case by denying her access to prospective witnesses Charlotte Anderson, Ann Frazier, Kathleen Waggoner and Etta Williams.

[10, 11] Rich employed Charlotte Anderson as a call girl. She makes no allegation whatsoever of contact between Anderson and the Government prior to trial. The Government denies having interviewed Anderson or even having known where she could be found; it did not call Anderson as a witness. Clearly there is no support for an inference of governmental concealment of Anderson. During the period in question, Ann Frazier and Kathleen Waggoner, neither of whom was called as a witness by the Government at Rich's trial, had been charged with crimes by the Government. Rich presents this sole fact as the basis for her charge of concealment by the Government. The facts of this case simply do not support an equation of indictment with concealment and we decline to infer such an equation.

[12] Etta Williams was the Government's initial source of information in this case. Shortly after her involvement in the investigation of the case began, her apartment was firebombed. This event, plus another incident which suggested that her safety was in continuing jeopardy, resulted in her being placed in the protective custody of the Government and being given a new identity. Understandably, she did not wish to speak to defendants prior to trial. Rich has not shown that this reluctance on Williams' part was anything other than a matter of her own personal choice. The fact that the Government had undertaken to protect her does not transform this choice into governmental concealment. Moreover, Rich's claim of prejudice because of her inability to interview Williams prior to trial is undercut by events which transpired during trial. Williams was present on the trial dates and was made available to the defendants after the Government determined that it would not use her as a witness. Defendants interviewed Williams at that time and decided not to call her as a witness. We conclude that Rich has failed to establish that the Government precluded her from interviewing a witness willing to talk with her prior to trial or that her lack of pretrial contact with Williams was prejudicial to her defense.

Grand jury testimony of Kathleen Waggoner

Count II of the indictment underlying the instant case charged Rich with a § 2421 violation with regard to the transportation of Kathleen Waggoner to Chicago. Waggoner's trip to Chicago was also one of the overt acts alleged in support of the conspiracy charged in Count I. On June 1, 1977, pursuant to a grant of use immunity, Waggoner testified before a grand jury investigating possible violations by Rich of 18 U.S.C. §§ 1503, 1952 and 2421. During her appearance before the grand jury, Waggoner denied that Rich had sent her to Chicago in 1976 to work as a prostitute at the boat show and also denied that Rich had ever set her up on prostitution dates. As a consequence of this testimony, Waggoner was indicted on two counts of perjury before the grand jury in violation of 18 U.S.C. § 1623. This indictment, which was handed down on June 25, 1977, set forth verbatim those portions of the grand jury transcript in which Waggoner denied that Rich had sent her to Chicago or set her up on prostitution dates. Waggoner was convicted on both counts of perjury at a trial which took place after the trial of Rich and Pelton.

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[13] In a pretrial motion, Rich sought "the testimony of all witnesses before any grand jury which investigated this matter which is favorable to this defendant." In its answer to Rich's motion, the Government stated that it would provide grand jury transcripts only insofar as it was required to do so by 18 U.S.C. § 3500. The trial court sustained the Government's position and denied Rich's motion. This ruling was consonant with the well-established rule in this circuit that grand jury testimony is generally not discoverable on pretrial motion. *United States v. Harflinger*, 436 F.2d 928, 935 (8th Cir. 1970), *cert. denied*, 402 U.S. 973, 91 S.Ct. 1660, 29 L.Ed.2d 137 (1971).

[14] Waggoner was not called as a witness at Rich's trial. If the Government had called Waggoner and if she had testified, Rich would have been entitled to a transcript of her grand jury testimony under 18 U.S.C. § 3500. Rich herself did not attempt to call Waggoner as a witness. Rather, she assumed that Waggoner would refuse to testify and sought, on that basis, to introduce a transcript of Waggoner's grand jury testimony into evidence.

On the morning of the third day of trial, counsel for Rich made the following in-chambers presentation to the trial court:

> I have caused a subpoena to be served upon Kathleen Waggoner to testify. It is my understanding that she is under charges at the present time in this Court or in another Division and her attorney has indicated that he will advise her to invoke her privilege under the Fifth Amendment and refuse to testify. On that basis, Your Honor, I would request an opportunity to utilize her Grand Jury testimony and introduce portions of the Grand Jury testimony which would be relevant and request that the Government furnish me with a copy of her Grand Jury testimony. I believe that it would be admissible pursuant to Rule 804 of the Federal Rules of Evidence.

The Government objected to the use of Waggoner's grand jury testimony. The court and both parties then discussed the general nature of Waggoner's testimony before the grand jury, the use immunity under which she had testified and the perjury indictment then pending against her. The district judge ultimately refused to allow Rich to introduce the transcript of Waggoner's grand jury testimony into evidence. Contemporaneously, however, he ruled that Rich could read Waggoner's indictment to the jury. Although this indictment contained testimony in which Waggoner denied that Rich had sent her to Chicago or had set her up on prostitution dates, counsel for Rich chose not to introduce it into evidence.

Rich now contends that Waggoner's grand jury testimony was admissible under Fed.R.Evid. 804(a)(1) and that the trial court erred in refusing to allow her to introduce the relevant portions of this transcript at trial. Rule 804 sets forth those instances in which the hearsay statements of unavailable declarants may be admitted into evidence at trial. Rich relies upon § (a)(1) of Rule 804, which provides that a declarant is "unavailable" if he or she "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement."

[15, 16] The unavailability requirement of Rule 804 places the burden of producing an unavailable declarant upon the proponent of the evidence. *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976), *cert. denied*, 429 U.S. 1101, 97 S.Ct. 1125, 51 L.Ed.2d 551 (1977); *see generally* 11 Moore's Federal Practice ¶ 804.02, at VIII–239–40 (2d ed. 1976). Rich, the proponent here, accordingly had the burden of establishing that Waggoner would invoke her fifth amendment privilege and thus be unavailable to testify. Our review of the record convinces us that Rich utterly failed to carry this burden. Counsel for Rich made no effort to produce Waggoner, whom he had subpoenaed, and to demonstrate firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege against self-incrimination. Rather, he chose to raise the issue of her privilege in an extenuated and circuitous manner which gave the court

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nothing more than a speculative basis for determining whether she was available. Rich's proof that Waggoner was unavailable under Rule 804(a)(1) was that Waggoner's attorney had said that he was going to advise Waggoner not to testify. There was no indication that Waggoner had in fact been so advised or that, if she had been, she had decided to exercise her privilege. We consider Rich's suggestion, that Waggoner might in the future be advised of and then choose to exercise her fifth amendment privilege, to be a wholly inadequate showing of unavailability under Rule 804(a)(1). The trial court did not err in refusing, on this speculative basis, to allow Rich to introduce into evidence the transcript of Waggoner's testimony before the grand jury.[8]

Sufficiency of the evidence

[17, 18] Rich contends that the evidence was insufficient to support her convictions. In considering this contention, we must view the evidence in the light most favorable to the Government. *Glasser* ▌ *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942). We have done so and we conclude that the evidence against Rich is legally sufficient to support her convictions. Indeed, the plethora of evidence of Rich's participation in the transportation of women to Chicago and Nevada is such that we cannot find a close question of evidentiary sufficiency on any of the seven counts on which she was convicted. Under these circumstances we choose not to catalogue the evidence adduced against Rich. Suffice it to say that the evidence, when viewed in the light most favorable to the Government, is more than sufficient to support the jury's verdicts of guilty on Counts I–VII.

We will now address defendant Pelton's contentions.

Constitutionality of 18 U.S.C. § 2421

[19] Pelton argues that since prostitution is legal in Winnemucca, Nevada, the destination of the female whose interstate transportation underlies his convictions, the Mann Act unconstitutionally violates and derogates "the rights of females to seek legal employment as guaranteed by the constitution of this country." As we have previously noted, "[i]t is rather late in the history of the Mann Act to still be contending for its unconstitutionality. The Act has been consistently upheld * * *." (Citations omitted.) *United States* ▌ *Garrett*, 521 F.2d 444, 446 (8th Cir. 1975). Defendant Pelton is not a female whose ability to seek legal employment was constrained by the Mann Act and he consequently lacks standing to attack the statute on this basis. *See United States* ▌ *Garrett, supra* at 446. Because of his lack of standing, we pretermit analysis of the substance of his constitutional challenge, although we cannot help but note that its strength appears to lie in its ingenuity rather than in any degree of legal cogency. It is difficult to conceive of prostitution as being constitutionally guaranteed and protected.

8. Rich also argues that the Government breached its duty of disclosure under *Brady* ▌ *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to release Waggoner's grand jury testimony. Under *Brady*, governmental suppression at trial of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* ▌ *Maryland, supra* at 87, 83 S.Ct. at 1196. We can find no due process infringement in the instant case. Unlike *Brady*, where the evidence suppressed by the prosecution did not come to the defendant's notice until after he had been tried, convicted and sentenced and his conviction had been affirmed, defendant Rich clearly had notice prior to trial of the evidence at issue here and in fact had access to the crucial aspects of Waggoner's grand jury testimony through the Waggoner indictment. She chose not to introduce the indictment with this verbatim testimony into evidence. We would ordinarily be hesitant to construe a tactical decision of this nature as an indicator of the materiality of evidence. Rich's subsequent treatment of Waggoner's grand jury testimony, however, supports the initial impression that its worth to Rich's defense was nugatory. Although Rich has had access to Waggoner's grand jury testimony since Waggoner's trial, when it became a matter of public record, she has failed to specify any favorable evidence therein which she did not already have access to by way of Waggoner's indictment. On these facts, we reject Rich's claim that non-access at trial to Waggoner's grand jury testimony constituted a violation of her right to due process.

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Severance

[20] Pelton filed a pretrial motion for severance which was denied by the District Court on July 27. At a pretrial proceeding on the morning of August 1, counsel for Pelton brought the severance issue back to the District Court's attention in a somewhat roundabout way, expressing the opinion that Pelton could not receive a fair trial because most of the evidence in the case was unrelated to Pelton. He made no formal motion for a severance at this time, however. Moreover, it is undisputed that Pelton did not renew the motion for severance at the close of the Government's evidence or at the conclusion of all the evidence. If not so renewed, the motion is "deemed waived." *United States v. Porter*, 441 F.2d 1204, 1212 (8th Cir.), cert. denied, 404 U.S. 911, 92 S.Ct. 238, 30 L.Ed.2d 184 (1971). Accordingly, we hold that Pelton has waived his right to assert the severance issue.

Sufficiency of the evidence

Pelton was charged in only those four counts of the indictment related to the Nevada trips. He was acquitted on Counts VI and VIII, which charged him with inducing the transportation to Nevada of Shirley Dawson and Charlotte Anderson. He was convicted on Count [redacted], the conspiracy charge stemming from the Nevada trips, and on Count VII, the charge involving the inducement of Kathleen Bray to travel to Nevada. Pelton contends that his convictions on Counts VI and VII are not supported by sufficient evidence.

[21-23] In analyzing this contention, our point of departure must be those well-worn principles which require us to view the evidence in the light most favorable to the Government, *Glasser* [redacted] *United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and to accept as established all reasonable inferences from the evidence that tend to support the jury's verdict. *United States* [redacted] *Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853, 95 S.Ct. 96, 42 L.Ed.2d 85 (1974). We must, moreover, be guided by the general rule that "it is not necessary that the evidence exclude every reasonable hypothesis except that of guilt but simply that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty." *United States* [redacted] *Shahane*, 517 F.2d 1173, 1177 (8th Cir.), *cert. denied*, 423 U.S. 893, 96 S.Ct. 191, 46 L.Ed.2d 124 (1975). This standard also applies in cases where the conviction rests on circumstantial evidence, *see United States* [redacted] *Joyner*, 539 F.2d 1162, 1165 (8th Cir.), *cert. denied*, 429 U.S. 983, 97 S.Ct. 499, 50 L.Ed.2d 593 (1976); *United States* [redacted] *Shahane*, *supra* at 1177, since circumstantial evidence is intrinsically as probative as direct evidence. *Holland* [redacted] *United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 731 (1954). With these familiar principles in mind, we address Pelton's attack upon the sufficiency of the evidence supporting his convictions.

Count V

Count [redacted] charged Pelton and Rich with a conspiracy to "knowingly transport in interstate commerce a woman or girl for the purpose of prostitution or debauchery and other immoral purposes [a violation of Title 18, U.S.C. § 2421]." The indictment posited that in furtherance of this conspiracy Rich and Pelton agreed to send women and girls from St. Louis, Missouri, to Winnemucca, Nevada, for purposes of prostitution on various dates in October 1976, and that Rich gave Shirley Dawson, Kathleen Bray and Charlotte Anderson money to purchase tickets to Reno, Nevada.

Pelton contends generally that the evidence supporting his conspiracy conviction does not prove the existence of an unlawful agreement between him and Rich. More specifically, he argues that any agreement that may have existed was lawful because prostitution is legal in Nevada and/or because the women in question travelled to Nevada on their own volition.

[24, 25] "The offense of conspiracy consists of an agreement between the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy." *Unit-*

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ed States [redacted] *Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971). The agreement need not be express or formal and it may be established by circumstantial evidence. *United States* [redacted] *Hutchinson*, 488 F.2d 484, 490 (9th Cir. 1973), *cert. denied*, 417 U.S. 915, 94 S.Ct. 2616, 41 L.Ed.2d 219 (1974). Indeed, this court has long recognized that since conspiracy is rarely susceptible of proof by direct evidence, it may properly be adduced from the conduct of the parties and the attending circumstances. *Rizzo* [redacted] *United States*, 304 F.2d 810, 825 (8th Cir.), *cert. denied*, 371 U.S. 890, 83 S.Ct. 188, 9 L.Ed.2d 123 (1962); *Goode* [redacted] *United States*, 58 F.2d 105, 107 (8th Cir. 1932).

[26] The conduct of the parties and the attending circumstances revealed by the record here support the existence of an agreement by Rich and Pelton to transport women to Nevada for prostitution purposes. Bray, one of the women so transported, testified that she was present at Rich's apartment in St. Louis when Rich and Pelton decided to send her and another call girl named Georgia to Penny's Cozy Corner, a house of prostitution in Winnemucca, Nevada. In Bray's presence, Pelton made a telephone call to Penny's and arranged for her to work there. Pelton and Rich then gave Bray instructions on what to do when she reached Winnemucca. She was told to register as a prostitute, which would require lying about her age since she was not yet eighteen years old, to get a doctor's examination and then to go to Penny's. Bray, Rich and Pelton agreed that Bray would give 40% of her earnings to Penny's and split the remaining 60% with Rich. Bray also agreed to pay Pelton $200 for setting her up at Penny's. To finance the trip, Rich lent Bray $200 for clothes and $250 for airfare, a license and the accessories which would be necessary at Penny's. Bray subsequently flew from St. Louis to Nevada in accordance with the plans and arrangements formulated by Rich and Pelton and attempted to become a prostitute. Upon being denied a license in Winnemucca because she was under age, she returned to St. Louis. We believe that the evidence in this case was sufficient to have convinced the jury beyond a reasonable doubt that Pelton was guilty of participating in a conspiracy with Rich knowingly to transport a woman to Nevada in interstate commerce for purposes of prostitution.

[27, 28] We must reject as unavailing Pelton's attempt to legitimize his agreement with Rich by arguing that prostitution is legal in Nevada and that Bray had a desire to travel to Nevada and to work there as a prostitute which pre-existed his participation in the plans. Section 2421 flatly prohibits transportation of women in interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purposes"; its prohibition is not keyed to the legality or illegality of prostitution under the law of the state where the transportation ends. When Rich and Pelton agreed to send Bray to Nevada to work as a prostitute, they made an agreement to violate § 2421, and the status of prostitution under Nevada law has no bearing on the illegality of this agreement under the Mann Act.

[29, 30] Equally lacking in legal merit is Pelton's suggestion that any agreement he may have had with Rich was legal because Bray was predisposed and willing to go to Nevada to work as a prostitute. Whether or not Bray was so predisposed and willing is immaterial to the illegality of Pelton's agreement with Rich to violate § 2421, for consent is neither a defense to a violation charged under § 2421, *Gebardi* [redacted] *United States*, 287 U.S. 112, 119, 53 S.Ct. 35, 77 L.Ed. 206 (1932); *Hattaway* [redacted] *United States*, 399 F.2d 431, 433 (5th Cir. 1968); *Wiley* [redacted] *United States*, 257 F.2d 900, 905 (8th Cir. 1958), nor to a violation charged under § 2422. *Blumenfield* [redacted] *United States*, 284 F.2d 46, 53 (8th Cir.), *cert. denied*, 365 U.S. 812, 81 S.Ct. 693, 5 L.Ed.2d 692 (1960). Pelton conspired with Rich to transport Bray in interstate commerce to Nevada for purposes of prostitution in violation of § 2421. Whatever Bray's degree of willingness to travel may have been, it does not vitiate the illegality of the agree-

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ment to transport her for purposes of prostitution.

Count VII

Count VII charged Pelton and Rich with violating 18 U.S.C. § 2422 by persuading, inducing and enticing Kathleen Bray to go in interstate commerce to Nevada with the intent on their part that she engage in prostitution there, and with thereby knowingly causing her to be transported there as a passenger upon the line and route of a common carrier in interstate commerce. In challenging the sufficiency of the evidence supporting his conviction on this count, Pelton does not dispute that Bray was transported to Nevada for purposes of prostitution. His attack on the sufficiency of the evidence pertains to the issue of inducement. He seems to contend that because there was evidence that Bray was willing to go to Nevada to work as a prostitute, the record will not support a finding of inducement on his part.

[31-33] We are unable to agree. Even if we assume that Bray was willing to travel to Nevada to be a prostitute, the fact remains that by setting her up at Penny's Cozy Corner, Pelton helped provide the inducement which caused her to make the trip.[9] It is the inducement of transportation which is prohibited under § 2422, not the actual provision of that transportation. *Nunnally* [redacted] *United States*, 291 F.2d 205, 206–07 (5th Cir. 1961). When an offer to travel interstate for purposes of prostitution elicits a positive response from a woman to whom it is made, it constitutes a requisite inducement under the statute. *Harms* [redacted] *United States*, 272 F.2d 478, 481 (4th Cir. 1959), *cert. denied*, 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960). The evidence here shows that Pelton made an inducement sufficient to persuade Bray to travel to Nevada. We believe that Pelton's conviction under § 2422 with regard to Bray's inducement is supported by sufficient evidence.

Affirmed.

9. Indeed, the fact that until Pelton "placed" her at Penny's, Bray may have harbored an unfulfilled wish to go to Nevada to be a prostitute emphasizes rather than undercuts the causal relationship between Pelton's inducement and Bray's trip.

Maurice M. VERVAECKE, Appellant,

v.

CHILES, HEIDER & CO., INC., Dean Witter & Co., Incorporated, Arthur Young & Company, Northwestern National Bank, Hospital Authority No. 1 of Sarpy County, Nebraska and Midlands Community Hospital, Appellees.

No. 77-1923.

United States Court of Appeals,
Eighth Circuit.

Submitted April 14, 1978.

Decided June 9, 1978.

Purchaser of corporate bonds brought securities fraud action against broker dealers, issuer's auditor and others. The United States District Court for the District of Nebraska, Albert G. Schatz, J., entered summary judgment dismissing the complaint, and purchaser appealed. The Court of Appeals, Ross, Circuit Judge, held that: (1) reliance could not be presumed since case was not one involving primarily nondisclosure but, rather, was based on fraudulent misstatements and omissions in offering prospectus; (2) reliance element was lacking where purchaser did not see offering statements until after commitment to purchase had been made, and (3) it was not error to strike plaintiff's class action allegations either as to bond issue in which he had dealt or issue in which he had not traded.

Affirmed.

1. Securities Regulation ⇐143

Reliance could not be presumed in securities fraud action brought by purchaser of corporate bonds and purchaser was obligated to state facts sufficient to raise a genu-

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UNITED STATES of America, Appellee,

v.

John T. SPURLOCK, Appellant.

No. 06–3262.

United States Court of Appeals, Eighth Circuit.

Submitted: Jan. 10, 2007.

Filed: July 30, 2007.

Background: Defendant was convicted in the United States District Court for the Western District of Missouri, Gary A. Fenner, J., of seven counts of violating federal child exploitation statutes, and was sentenced to 168 months in prison. Defendant appealed.

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

(1) convictions did not require proof that the intended victim was an actual minor, as long as defendant believes that the victim is a minor;

(2) defendant's conversations with undercover officer were sufficient to support conviction for attempt to entice minor victims to engage in unlawful sexual activity; and

(3) defendant was not entitled to sentencing reduction for acceptance of responsibility.

Affirmed.

Bright, Circuit Judge, filed opinion concurring in part, and dissenting in part.

1. Infants ⇐20

Convictions for attempting to entice a minor to engage in illegal sexual activity, attempting to transfer obscene material to someone under the age of 16, and attempting to travel in interstate commerce for the purpose of engaging in illicit sexual conduct do not require proof that the intended victim is an actual minor, as long as defendant believes that the victim is a minor. 18 U.S.C.A. §§ 1470, 2422(b), 2423(b).

2. Infants ⇐20

Defendant's conversations with undercover officer, who defendant believed was the adult mother of two young girls, were sufficient to support conviction for attempt to entice minor victims to engage in unlawful sexual activity; defendant described to the "mother" his desire to perform sex acts on her "daughters", he asked her to tell her daughters about his wishes, and to instruct the girls not to tell anyone, and he made plans with the mother to meet at a motel to have sex with the daughters. 18 U.S.C.A. § 2422(b).

3. Criminal Law ⇐44

The elements of attempt are (1) intent to commit the predicate offense, and (2) conduct that is a substantial step toward its commission.

4. Sentencing and Punishment ⇐765, 963

The burden is on a defendant claiming a two-level sentencing reduction for acceptance of responsibility to show that he clearly demonstrated acceptance of responsibility. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

5. Criminal Law ⇐1158(1)

A district court's factual determination about whether the defendant accepted responsibility is entitled to great deference, for sentencing purposes, and the appellate court will reverse it only if it is so clearly erroneous as to be without foundation. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

6. Sentencing and Punishment ⇐765

Defendant convicted of multiple violations of federal child exploitation statutes was not entitled to sentencing reduction for acceptance of responsibility; defendant did not plead guilty, he did not indicate

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that his defense at trial would be purely legal, he did not demonstrate contrition, and although he stipulated to a few basic facts, mostly relating to the foundation of prosecution exhibits, he did not stipulate to the content of the exhibits, or to the factual elements of guilt. 18 U.S.C.A. §§ 1470, 2422(b), 2423(b); U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

7. Sentencing and Punishment ⇐765

Timeliness of defendant's cooperation is a relevant factor in determining eligibility for a two-level sentencing reduction for acceptance of responsibility, both because untimely admissions may force the government and the court to expend resources unnecessarily, and because the timeliness of a defendant's acceptance of responsibility is a measure of his true contrition and remorse for the criminal conduct. U.S.S.G. § 3E1.1(a), 18 U.S.C.A.

Travis D. Poindexter, Asst. Fed. Public Defender, Kansas City, MO, argued (Raymond C. Conrad, Jr., Fed. Public Defender, on the brief), for appellant.

Philip M. Koppe, Asst. U.S. Atty., Kansas City, MO, argued (Bradley J. Schlozman, U.S. Atty., Katharine Fincham, Asst. U.S. Atty., on the brief), for appellee.

Before COLLOTON, BRIGHT, and GRUENDER, Circuit Judges.

COLLOTON, Circuit Judge.

Following a bench trial, John T. Spurlock was convicted of seven counts of violating federal child exploitation statutes in connection with his attempt to entice two minors to engage in unlawful sexual activity. The district court [1] imposed concurrent sentences of 168 and 120 months' imprisonment. Spurlock appeals, and we affirm.

I.

In January 2005, Spurlock entered an Internet chat room entitled "Daughters Who Love Daddies," and made contact with a person who identified herself as "Mary [redacted]" "Mary" told Spurlock she had two young daughters, thirteen-year-old "Amber" and ten-year-old "Mandy." Unbeknownst to Spurlock, "Mary" was actually Detective Angie Wilson, an undercover agent with the FBI, and "Amber" and "Mandy" did not exist. Over the course of several Internet chats, Spurlock repeatedly expressed to "Mary" his desire to have sex with her and her daughters. During one online conversation, Detective Wilson, posing as "Mary," pretended to allow the girls to chat directly with Spurlock. Spurlock described various sex acts that he wanted to perform on the girls, and instructed them to perform sex acts on one another. Still believing he was talking to the girls, Spurlock exposed himself on his webcam and began masturbating.

In both online and telephone conversations with "Mary," Spurlock made plans to travel from his home in Texas to Kansas City, Missouri, to have sex with her daughters. On February 5, 2005, Spurlock arrived in Kansas City and telephoned "Mary" to inform her that he had purchased condoms and checked into a motel. FBI agents arrested Spurlock at the motel. Spurlock admitted that he had traveled to Kansas City for the purpose of having sex with "Amber" and "Mandy," whom he believed to be thirteen and ten years old.

1. The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

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A grand jury returned a seven-count indictment against Spurlock. Three counts charged him with attempting to entice a person below the age of eighteen to engage in unlawful sexual activity, in violation of 18 U.S.C. § 2422(b). Two counts charged him with attempting to transfer obscene material to someone below the age of sixteen, in violation of 18 U.S.C. § 1470. One count charged him with travel in interstate commerce for the purpose of engaging in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). One count sought the forfeiture of property Spurlock used in commission of the crimes.

Spurlock moved to dismiss the indictment. He claimed that his conduct did not violate the statutes under which he was charged, because no actual minor was involved. The district court denied the motion. Spurlock then rejected the government's offer of a conditional guilty plea, and asserted his right to go to trial. During the bench trial, Spurlock moved twice for a judgment of acquittal, reasserting his claim that the statutes did not prohibit his conduct. Spurlock also argued for acquittal on the grounds that his conversations with "Mary" were not, by themselves, an attempt to entice her daughters to have sex. The district court denied Spurlock's motions and found him guilty on all counts.

At sentencing, in calculating Spurlock's offense level under the advisory sentencing guidelines, the court denied Spurlock's request for a two-level reduction for acceptance of responsibility under USSG § 3E1.1(a). The court sentenced Spurlock to 168 months' imprisonment on each of the enticement and interstate travel counts, and to 120 months' imprisonment on each of the attempt to transfer obscene material counts, all to be served concurrently. Spurlock appeals the denial of his motions for a judgment of acquittal. He also contends that the district court erred by denying him a downward adjustment for acceptance of responsibility, and that he is thus entitled to be resentenced based on a more favorable advisory guideline sentence.

II.

[1] Spurlock's first argument for a judgment of acquittal is that the statutes under which he was convicted did not prohibit his conduct. He contends that because he conversed only with an undercover agent, and the statutes required that an actual minor must be involved, the government proved no violation of federal law. This argument is foreclosed by our decisions in *United States v. Helder*, 452 F.3d 751 (8th Cir.2006), and *United States v. Hicks*, 457 F.3d 838 (8th Cir.2006). In *Helder*, we concluded that an actual minor victim is not required for the crime of attempted enticement under § 2422(b). 452 F.3d at 756. In *Hicks*, we extended that reasoning to § 2423(b)'s prohibition of travel with intent to engage in illicit sexual conduct. 457 F.3d at 841. *Helder* and *Hicks* control here, and apply with equal force to the third statute under which Spurlock was convicted: attempt to knowingly transfer obscene matter to a minor under § 1470. Spurlock's belief that the person to whom he transferred obscene matter was under the age of sixteen is sufficient to convict him of attempt, even if the recipient was actually an adult. *See Helder*, 452 F.3d at 755.

[2] Spurlock next challenges his conviction on Count One of the indictment. Count One alleges that independent of Spurlock's direct conversations with the girls, his conversations with "Mary" were by themselves an attempt to entice her daughters to engage in unlawful sexual activity, in violation of § 2422(b). Spurlock argues that contact with an adult can never, by itself, be an attempt to entice a

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minor. In Spurlock's view, the statute requires direct communication with a minor or a purported minor. We disagree.

[3] The elements of attempt are (1) intent to commit the predicate offense, and (2) conduct that is a substantial step toward its commission. *United States v. Blue Bird*, 372 F.3d 989, 993 (8th Cir. 2004). We conclude that Spurlock intended to entice minor girls to have sex with him, and that his conversations with their purported mother were a substantial step toward that end. *See United States v. Murrell*, 368 F.3d 1283, 1287–88 (11th Cir. 2004); *United States v. Hornaday*, 392 F.3d 1306, 1310 (11th Cir.2004). Spurlock described to "Mary" his desire to perform sex acts on her daughters, provided her with suggestions about sex acts he would like the girls to perform on him, and asked her to tell the girls about his wishes. He relied on "Mary's" influence and control over her daughters, asking her to instruct the girls not to tell anyone what he planned to do to them. He made plans with "Mary" to meet at a motel in Kansas City where he would have sex with her and her daughters. He admitted at trial that he "tried to persuade those two girls through their mother to engage in sexual acts[.]" (Tr. at 76).

Spurlock's conversations with "Mary" bear the familiar hallmarks of criminal attempt. They went beyond mere preparation; they were necessary to the consummation of the crime; and they strongly corroborate Spurlock's criminal intent to entice the girls. *See United States v. Jonsson*, 15 F.3d 759, 761 (8th Cir.1994). We join the Eleventh Circuit in noting that "the efficacy of § 2422(b) would be eviscerated if a defendant could circumvent the statute simply by employing an intermediary to carry out his intended objective." *Murrell*, 368 F.3d at 1287. We do not believe the statute exempts sexual predators who attempt to harm a child by exploiting the child's natural impulse to trust and obey her parents. Accordingly, we conclude that Spurlock attempted to entice "Amber" and "Mandy" through his conversations with their purported mother, and we reject his challenge to the conviction on Count One.[2]

[4, 5] Finally, we consider Spurlock's claim that the district court erred at sentencing by denying him a two-level reduction for acceptance of responsibility. Under USSG § 3E1.1(a), the burden is on a defendant to show that he "clearly demonstrate[d]" acceptance of responsibility. *See United States v. Thomas*, 93 F.3d 479, 489 (8th Cir.1996). A district court's factual determination about whether the defendant accepted responsibility is entitled to great deference, and we will reverse it only if it is so clearly erroneous as to be without foundation. *United States v. Little Hawk*, 449 F.3d 837, 839 (8th Cir.2006).

[6] In certain "rare situations," a defendant may clearly demonstrate acceptance of responsibility despite his decision to go to trial. USSG § 3E1.1, comment. (n.2). "This may occur, for example, where a defendant goes to trial to assert or preserve issues that do not relate to factual guilt (*e.g.*, to make ... a challenge to the applicability of a statute to his con-

2. Spurlock's claim that his contact with "Mary" did not constitute statutory rape or statutory sodomy under Missouri law is beside the point. Section 2422(b) prohibits an attempt knowingly to entice a minor to engage in "any sexual activity for which any person can be charged with a criminal offense." Count One of the indictment alleges that Spurlock's conversations with "Mary" were an attempt to entice her daughters to engage in sexual activity with him, for which Spurlock could be charged with statutory rape and statutory sodomy under Missouri law. Therefore, Spurlock's actions fall within the scope of the federal statute.

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duct)." *Id.* In such instances, a court should look primarily to a defendant's pretrial statements and conduct to determine if he has accepted responsibility, *id.*, and the timeliness of a defendant's acceptance of responsibility is a relevant factor under 3E1.1(a). *Id.*, comment. (nn.1(h), 6). Of course, even a defendant who pleads guilty is not entitled to the downward adjustment as a matter of right, *id.*, comment. (n.3), so neither is a defendant who goes to trial to preserve issues that do not relate to factual guilt. Spurlock claims he went to trial only to advance a legal argument, and that the district court was required to find that his case exhibits one of the "rare situations" in which a defendant who is convicted at trial should receive the benefit of the adjustment. We disagree.

At the pretrial conference, Spurlock did not indicate that his defense at trial would be purely legal. He announced, rather, that he would rely on a defense of "general denial." (R. Doc. 42, at 3). Spurlock eventually stipulated to a few basic facts, mostly relating to the foundation for some prosecution exhibits, but he did not stipulate to the content of the more than sixty exhibits the government introduced at trial, or to the factual elements of guilt. After the government presented its case-in-chief, Spurlock took the stand and admitted to the factual allegations against him. (Tr. at 74–77).

The district court's finding that Spurlock did not clearly demonstrate acceptance of responsibility was not without foundation. At the pretrial conference, Spurlock had an opportunity to admit the factual elements of guilt and to narrow the case to purely legal issues—i.e., whether the federal statutes under which he was charged require the involvement of an actual minor, and whether 18 U.S.C. § 2242(b) requires direct communication with a minor. But through his general denial, Spurlock hedged his bet. He "put[ ] the government to its burden of proof at trial by denying the essential factual elements of guilt," USSG § 3E1.1, comment. (n.2), and preserved his right to urge an acquittal based on any shortcomings or missteps in the presentation of the government's case. *See United States v. Sumner*, 119 F.3d 658, 660 (8th Cir.1997) ("[A] general denial defense ... forces the government to prove every element of the crime charged.")

[7] The district court found that Spurlock's actions resulted in "considerable effort and preparation on the part of the government and necessitated the government presenting its case at trial." (Tr. at 84). Timeliness is a relevant factor in determining eligibility for a two-level reduction, both because untimely admissions may force the government and the court to expend resources unnecessarily, *see United States v. Kiel*, 454 F.3d 819, 824 (8th Cir.2006); *United States v. Erhart*, 415 F.3d 965, 972 (8th Cir.2005), and because the timeliness of a defendant's acceptance of responsibility is a measure of his true contrition and remorse for the criminal conduct. *United States v. Sierra*, 188 F.3d 798, 804 (7th Cir.1999); *United States v. Ewing*, 129 F.3d 430, 436 (7th Cir.1997). Spurlock's last-minute admissions, made *after* he waited to confirm that the government was able to prove the charged offenses in its case-in-chief, "had little effect on the quantum of evidence the government was required to present," *United States v. King*, 36 F.3d 728, 735 (8th Cir. 1994), and did not amount to persuasive showing of contrition and remorse. *See also United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir.2003); *United States v. Field*, 110 F.3d 592, 594 (8th Cir.1997) (upholding denial of acceptance-of-responsibility adjustment where defendant "went to trial contesting the factual elements of guilt" and made "no stipulations of guilty

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conduct . . . limiting the trial to a constitutional or statutory challenge").

Spurlock had an opportunity to proceed in a manner that could have qualified as a "rare situation" in which a defendant goes to trial and still earns an adjustment for acceptance of responsibility. But he bears the burden to demonstrate his entitlement to that benefit, and he failed to make an early demonstration of contrition, or to take the initiative to narrow the case to the straightforward legal issues that he now says were the only reason for a trial. We conclude that the district court did not clearly err when it denied an acceptance-of-responsibility reduction.

* * *

For these reasons, the judgment of the district court is affirmed.

BRIGHT, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority's affirmance of Spurlock's conviction. I dissent, however, from the majority's conclusion about Spurlock's acceptance of responsibility. The district court clearly erred when finding that Spurlock did not clearly demonstrate acceptance of responsibility.

The majority omits a crucial circumstance from its opinion. Contemporaneously with Spurlock's pre-trial proceedings, two other defendants faced virtually the same charges in the same district (but before a different judge) as Spurlock. *See United States v. Helder,* 452 F.3d 751 (8th Cir.2006); *United States v. Hicks,* 457 F.3d 838 (8th Cir.2006). Based on an argument that the statute under which they were charged, 18 U.S.C. § 2422(b), required the presence of an actual minor, rather than an adult pretending to be a minor, the district court granted those defendants' respective motions for judgment of acquittal after a jury trial, *see Helder,* 452 F.3d at 753, and dismissal of the indictment, *see Hicks,* 457 F.3d at 840. Spurlock's decision to proceed to trial was indisputably motivated by an attempt to preserve for appeal the same legal argument that had worked for similar defendants in the same court.[3]

The Guidelines specifically anticipate circumstances in which a defendant might require or prefer a trial in order to preserve certain legal issues. Commentary Note 2 to U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004) sets forth:

> a defendant may clearly demonstrate acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily on pre-trial statements and conduct.

In this case, Spurlock exercised his right to trial to preserve a challenge to the applicability of 18 U.S.C. § 2242(b) to his conduct. Thus, the court should determine his acceptance of responsibility on his pre-trial statements and conduct.

The PSI report indicates that Spurlock's pretrial statements and conduct undoubtedly demonstrate his acceptance of responsibility. Following his arrest, Spurlock admitted the wrongfulness of his conduct and confessed to all relevant conduct. Spurlock also consented to the search of his computer and to officers' assuming his online presence for further investigation. Throughout his pre-trial proceedings, Spurlock conceded that he had engaged in

3. Spurlock unsuccessfully argued the issue in his own case.

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the wrongful conduct, but maintained that the statute did not apply to his conduct. Spurlock, although requesting a trial, waived his right to a jury trial and stipulated to some of the government's evidence, including chain of custody of the computer files. At trial, he did not object to the admission of the government's exhibits and only cross-examined one of three government witnesses.

True, Spurlock put the government to some burdens at trial by his general denial. But the applicable note explains that the "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial . . ., is convicted, *and only then admits guilt and expresses remorse.*" U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n. 2 (2004) (emphasis added). Spurlock did not withhold admission of guilt until the government had met its burden of proof. He had previously admitted his conduct, stipulated to evidence, and conveyed an appreciation for the wrongfulness of his conduct. The acceptance of responsibility reduction cannot become solely a question of how much work the government was required to do; we must ultimately focus on whether the defendant himself exhibited responsibility and remorse for his conduct, which Spurlock did.

Spurlock faced the special and rare circumstances of seeing two other defendants avoid conviction on similar facts because of a statute's potential inapplicability. There is little question that Spurlock only went to trial to preserve that issue. Accordingly, I dissent from the majority in this respect and would have vacated Spurlock's sentence and remanded for re-sentencing with a reduction for acceptance of responsibility.

AUTO–OWNERS INSURANCE COMPANY, Plaintiff/Appellee,

v.

The TRIBAL COURT OF the SPIRIT LAKE INDIAN RESERVATION; Devils Lake Sioux Tribal Education Board, doing business as Four Winds Elementary School; Fort Totten Public School District, Defendants,

Tate Topa Tribal Education Board, also known as Spirit Lake Sioux Tribal Education Board, Defendant/Appellant,

Four Winds High School, Defendant,

Tate Topa Tribal School, also known as Four Winds Elementary School, Defendant/Appellant,

Vivian Lohnes, as Court–Appointed Custodian and Guardian of her Minor Granddaughter, Mary DeLorme, Defendant.

No. 06–3562.

United States Court of Appeals, Eighth Circuit.

Submitted: May 17, 2007.

Filed: Aug. 1, 2007.

Background: Insurer filed declaratory judgment action against insured Indian elementary school and education board, seeking determination of whether commercial general liability policy and commercial umbrella policy covered alleged sexual assault of student. The United States District Court for the District of North Dakota, Ralph R. Erickson, J., denied insured's motion to dismiss and granted insurer summary judgment. Insured appealed.

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

(1) court lacked diversity jurisdiction;

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (242!) & DA(2007)

DATABASES(S) - ALLFEDS

1. C U.S. [redacted]. Bass, Slip Copy, 2007 WL 2416437, , D.N.J., August 20, 2007(Crim. No. 07-232 (SRC).)

...defendant's motion for reconsideration of the Order dated April 5, 2007, which granted the motion of the United States to **detain** the defendant pending trial; and the Hon. Stanley R. Chesler having referred this motion to the Undersigned; and the Court ...

...FN1. In support of his motion, the defendants argues that the Court should reconsider its April 5, 2007 Order to **detain** him because its analysis was not consistent with 18 U.S.C. § 3142(f) and the dictates of United States [redacted] ...

...commit an offense identified in Section 3142(f) if released and that such a finding is necessary to order pretrial **detention**. Second, and relatedly, he argues that Himler's rationale and its requirement that proof of such recidivism is necessary despite the amendments to the Bail Reform Act. Third, the defendant argues that the Court should reconsider its **detention** decision given the absence of any allegations that he used a firearm in a violent manner, the absence of current...

2. C U.S. [redacted]. Music, Slip Copy, 2007 WL 2067057, , W.D.Ky., July 16, 2007(No. 1:07-CR-21-R.)

...the Minor was not pregnant. A one (1) count indictment was issued charging that the Defendant violated 18 U.S.C. § **2423** ; Transportation in Interstate Commerce With Intent to Engage in Criminal Sexual Activity with a Minor. After the indictment, the Minor ...

...a hearing was held before the Honorable Magistrate Judge E. Robert Goebel ("Judge Goebel"), for the purposes of arraignment and **detention**. At that hearing, the Court ultimately determined that the Defendant had rebutted the **presumption** against **detention** as there were conditions and combinations of conditions that would reasonably assure the appearance of the Defendant as well as ...

...a no-contact provision not only with the Minor, but also her family and any other minor females; total home **detention** except for supervised medical treatment or meetings with his attorney; electronic monitoring; travel restrictions (including turning in his passport); third...

3. H U.S. [redacted]. Abdullahu, 488 F.Supp.2d 433, 2007 WL 1556837, , D.N.J., May 24, 2007(No. 07-2050 (JS).)

...Attorney , Camden, NJ, for United States of America. OPINION DENYING DEFENDANT'S MOTION FOR RELEASE ON BAIL AND IN SUPPORT OF **DETENTION** ORDER SCHNEIDER , United States Magistrate Judge. This matter is before the Court on the request of defendant Agron Abdullahu (hereinafter "defendant") for a **detention** hearing pursuant to 18 U.S.C. § 3142(f) On May 14, 2007, defendant filed his "Motion for Release on Bail." [Doc. No. 10]. Pursuant to 18 U.S.C. § 3142(f) the Court held a **detention** hearing on May 17, 2007. For the reasons to be discussed, the Court denies defendant's Motion and finds that no ...

...this Opinion will set forth the Court's written findings of fact and a written statement of the reasons for the **detention**. FN1. At the conclusion of the May 17, 2007 **detention** hearing this

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (242!) & DA(2007)

DATABASES(S) - ALLFEDS

Court ruled from the Bench and read into the record the sum and substance of this Opinion. This written Opinion formalizes the Court's ruling. A **detention** Order was entered on May 17, 2007. [Doc. No. 14]. Background On May 7, 2007, this Court signed a Complaint ...

...5 , appeared before this Court for an initial appearance on May 8, 2007. On that date an Order of Temporary **Detention** was entered and a **detention** hearing was scheduled for May 11, 2007. [Doc. No. 7]. On May 11, 2007, defendant's counsel requested and was granted an extension for the date of the **detention** hearing until May 17, 2007. Findings of Fact 2 FN2. All of the facts summarized herein were included in the government's proffer at the May 17, 2007 **detention** hearing which included the May 7, 2007 Complaint naming the defendant and the reports of Pretrial Services. The proffer also...

4. **C** U.S. [redacted]. Capozzoli, Slip Copy, 2007 WL 129037, , N.D.Ind., January 12, 2007(No. 2:06 CR 167.)

...Adam Tavitas , Merrillville, IN, for Defendant. Philip Craig Benson U.S. Attorney's Office , Hammond, IN, for Plaintiff. OPINION AND ORDER OF **DETENTION** ANDREW P. RODOVICH , United States Magistrate Judge. At the August 22, 2006 initial appearance, the government requested that the defendant ...

...August 25, 2006, committing the defendant to a United States Medical Center for Federal Prisoners for a mental evaluation. A **detention** hearing was conducted on December 21, 2006, and the court now makes the following findings of fact: 1. The defendant currently is charged in a one count indictment with a violation of 18 U.S.C. § **2422(b)** If convicted, the defendant faces a mandatory minimum sentence of ten years imprisonment and a maximum sentence of life imprisonment. 2. At the **detention** hearing, the government proffered evidence to supplement the indictment and the prebond report. The defendant also proffered evidence based upon ...

...brother, the defendant has problems following directions and could not have made the trip to Lafayette. Under 18 U.S.C. § **3142(e)** , a defendant may be **detained** as a danger to the community if he is charged with a **crime** of **violence** under Section 3142(f)(1)(A) The defendant is charged with using the internet to solicit sex with someone he believed to be a 13 year old girl in violation of 18 U.S.C. § **2422(b)** If this constitutes a **crime** of **violence**, there is a rebuttable **presumption** in favor of **detention**. In United States [redacted]. Munro, 394 F.3d 865 (10th Cir.2005) , the defendant was charged with using the internet to solicit sex with a minor in violation of Section **2422(b)** along with carrying a firearm during a **crime** of **violence** in violation of 18 U.S.C. § 924(c) The Court of Appeals concluded that the attempted sexual abuse of a minor was a **crime** of **violence** and upheld the Section 924(c) conviction. 394 F.3d at 870-871 See also United States [redacted]. Abad, 350...

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (225!) & DA(2007)

DATABASES(S) - ALLFEDS

1. H U.S. [redacted]. Sabhnani, 493 F.3d 63, 2007 WL 1965536, , C.A.2 (N.Y.), July 06, 2007(Docket No. 07-2567-cr.)

...illegal aliens. The United States District Court for the Eastern District of New York Thomas C. Platt , J., ordered defendants **detained**. Defendants appealed. 3 Holding: The Court of Appeals Reena Raggi , Circuit Judge, held that government had failed to show that ...

...Bail 49II In Criminal Prosecutions 49 49 Proceedings to Admit to Bail 49 49(3) Evidence 49 49(4) k. **Presumptions** and Burden of Proof. When charge against federal defendant does not trigger statutory **presumption** that no conditions of release can adequately assure defendant's attendance at trial, government has burden to demonstrate by preponderance of ...

...and that no condition or combination of conditions can be imposed reasonably to assure his required attendance. 18 U.S.C.A. § **3142(e)** [2] 110 Criminal Law 110XXIV Review 110XXIV(O) Questions of Fact and Findings 110 1158 In General 110 1158(1) k. In General. In general, Court of Appeals reviews district court's order of **detention** for clear error. 18 U.S.C.A. § **3142(e)** [3] 49 Bail 49II In Criminal Prosecutions 49 41 Right to Release on Bail 49 42 k. In General. 49...

2. C U.S. [redacted]. Megahed, 519 F.Supp.2d 1236, 2007 WL 3132418, 21 Fla. L. Weekly Fed. D 29, , M.D.Fla., October 25, 2007(No. 8:07-cr-342-T-23MAP.)

...2) fact that defendant was not charged with offense enumerated in Bail Reform Act did not preclude his pre-trial **detention**. Motion granted. West Headnotes [1] 49 Bail 49II In Criminal Prosecutions 49 49 Proceedings to Admit to Bail 49 49 ...

...49 Proceedings to Admit to Bail 49 49(3) Evidence 49 49(3 1) k. In General. Bail Reform Act authorizes **detention** in any case in which court determines after due process hearing (1) by preponderance of evidence that no conditions of ...

...General. Fact that defendant was not charged with offense enumerated in Bail Reform Act did not preclude his pre-trial **detention** based on prospect of future crimes. 18 U.S.C.A. § 3142 Jay L. Hoffer , U.S. Attorney's Office, Tampa, FL, for Plaintiff...

3. → U.S. [redacted], Slip Copy, 2007 WL 3028307, , W.D.N.C., October 15, 2007(No. 1:07 cr 69-2.)

...heard before the undersigned, pursuant to a motion filed by defendant's counsel on September 25, 2007 entitled "Motion to Reconsider **Detention** Order" (# **225**) and from the evidence offered by the defendant and the evidence offered by the Government and the arguments of counsel ...

...illegal gambling business, conspiracy to commit bribery, bribery of a law enforcement officer and conspiracy to commit money laundering. A **detention** hearing was held for the defendant on August 3, 2007. At that time, the undersigned entered an order **detaining** the defendant pending further orders of the court. On August 7, 2007, the undersigned entered a written Order of **Detention** (# 59) in which the undersigned presented in writing the reasons for the court's decision to

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (225!) & DA(2007)

DATABASES(S) - ALLFEDS

detain the defendant. The written **detention** order filed in this matter is incorporated herein by reference as if fully set forth herein. On September 25, 2007 defendant's counsel filed a motion entitled "Motion to Reconsider **Detention** Order" (# **225**). In the motion, defendant's counsel sets forth that the defendant has been completely cooperative with the Government and that the ...

...position that the defendant did not personally initiate any attempts to obstruct justice and that the court's basis for the **detention** of the defendant no longer exists. Thomas Boggs, attorney for the defendant, presented a proffer of evidence to the court...

4. C U.S. [redacted]. Comstock, 507 F.Supp.2d 522, 2007 WL 2588815, , E.D.N.C., September 07, 2007(Nos. 5:06-HC-2195BR, 5:06-HC-2202BR, 5:06-HC-2205BR, 5:06-HC-2206BR, 5:06-HC-2212BR.)

...U.S.C.A. § 4248 [3] 92 Constitutional Law 92VI Enforcement of Constitutional Provisions 92VI(C) Determination of Constitutional Questions 92VI(C)3 **Presumptions** and Construction as to Constitutionality 92 990 k. In General. Statutes are presumed constitutional. [4] 92 Constitutional Law 92XX Separation ...

...of "Receipt [by computer] of materials depicting a minor engaging in sexually explicit conduct" in violation of 18 U.S.C. § **2252(a)(2)** , and to one count of forfeiture. He was sentenced to a 37-month prison term to be followed by a ...

...release based on his guilty plea to one count of possession of child pornography in violation of 18 U.S.C. § **2252(a)** (5)(B) and (b)(2) Matherly's term of imprisonment expired on 23 November 2006, and he is currently confined at...

5. C U.S. [redacted]. Bass, Slip Copy, 2007 WL 2416437, , D.N.J., August 20, 2007(Crim. No. 07-232 (SRC).)

...defendant's motion for reconsideration of the Order dated April 5, 2007, which granted the motion of the United States to **detain** the defendant pending trial; and the Hon. Stanley R. Chesler having referred this motion to the Undersigned; and the Court ...

...FN1. In support of his motion, the defendants argues that the Court should reconsider its April 5, 2007 Order to **detain** him because its analysis was not consistent with 18 U.S.C. § 3142(f) and the dictates of United States [redacted] ...

...commit an offense identified in Section 3142(f) if released and that such a finding is necessary to order pretrial **detention**. Second, and relatedly, he argues that Himler's rationale and its requirement that proof of such recidivism is necessary despite the amendments to the Bail Reform Act. Third, the defendant argues that the Court should reconsider its **detention** decision given the absence of any allegations that he used a firearm in a violent manner, the absence of current...

6. C U.S. [redacted]. Schenberger, 498 F.Supp.2d 738, 2007 WL 2230182, , D.N.J., July 27, 2007(Mag. No. 07-2077(JS).)

...No. 07-2077(JS). July 27, 2007. Background: Defendant, who was charged with receiving and distributing child pornography, requested a **detention** hearing. 5 Holding: The District Court Joel Schneider , United States Magistrate Judge, held that defendant was not entitled to bail ...

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (225!) & DA(2007)

DATABASES(S) - ALLFEDS

...that he was not charged with physically abusing a minor and had agreed not to use or access a computer. **Detention** ordered. West Headnotes [1] 49 Bail 49II In Criminal Prosecutions 49 41 Right to Release on Bail 49 42 5 k ...

...Bail 49II In Criminal Prosecutions 49 49 Proceedings to Admit to Bail 49 49(3) Evidence 49 49(4) k. **Presumptions** and Burden of Proof. If the government moves for **detention** on the basis of danger to the community, it must prove that by clear and convincing evidence, but if government or court believes **detention** is appropriate because there is a risk of flight, that must be proved by a preponderance of the evidence. 18 U.S.C.A. § **3142**(**e**) [3] 49 Bail 49II In Criminal Prosecutions 49 49 Proceedings to Admit to Bail 49 49(3) Evidence 49 49(4) k. **Presumptions** and Burden of Proof. If probable cause exists to believe that defendant committed an offense listed under statute prohibiting certain activities relating to material involving the sexual exploitation of minors, rebuttable **presumption** exists that no condition or combination of conditions will reasonably assure the safety of any other person and the appearance of the person as required; once the rebuttable **presumption** is established, the burden is then placed on the defendant to produce countervailing evidence that forms a basis for his...

7. → U.S. [redacted]. Johnson, Slip Copy, 2007 WL 1712541, , E.D.Mich., June 13, 2007(No. 07-CR-30292.)

...13, 2007. Janet L. Parker U.S. Attorney's Office , Bay City, MI, for Plaintiff. DECISION AND ORDER DENYING GOVERNMENT'S MOTION TO **DETAIN** CHARLES E. BINDER , United States Magistrate Judge. The Government moves for **detention** pursuant to 18 U.S.C. § 3142 , but questions whether the **detention** hearing should be heard in this district. The Bail Reform Act does not provide explicit guidance as to whether the **detention** hearing should be held in the district of arrest or in the charging district. In this case, the conduct charged ...

...relevant information is available in this district, the Court finds that it is proper to consider the Government's motion to **detain** in this district. On the issue of **detention**, the Government initially asserts that the **presumption** in favor of **detention** applies. The relevant statute provides that, [s]ubject to rebuttal by the person, it shall be presumed that no condition or ...

...maximum term of imprisonment of ten years or more is prescribed in an offense involving a minor victim under section **2252**(**a**) (**2**) of this title. 18 U.S.C. § **3142**(**e**) The Court finds that the Government is correct-the **presumption** does in fact apply. As a matter of law, the Indictment in this case, standing alone, suffices to establish probable...

8. H U.S. [redacted]. Abdullahu, 488 F.Supp.2d 433, 2007 WL 1556837, , D.N.J., May 24, 2007(No. 07-2050 (JS).)

...Attorney , Camden, NJ, for United States of America. OPINION DENYING DEFENDANT'S MOTION FOR RELEASE ON BAIL AND IN SUPPORT OF **DETENTION** ORDER SCHNEIDER , United States Magistrate Judge. This matter is before the Court on the request of defendant Agron Abdullahu (hereinafter "defendant") for a **detention** hearing pursuant to 18 U.S.C. § 3142(f) On May 14, 2007, defendant filed his "Motion for Release on Bail." [Doc. No. 10]. Pursuant to 18 U.S.C. § 3142(f) the Court held a **detention** hearing on May 17, 2007. For the reasons to be discussed, the Court denies defendant's Motion and finds that no ...

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QUERY - 3142(E) & (DETAIN! DETENTION) & PRESUMPTION & "CRIME OF VIOLENCE" & (225!) & DA(2007)

DATABASES(S) - ALLFEDS

...this Opinion will set forth the Court's written findings of fact and a written statement of the reasons for the **detention**. FN1. At the conclusion of the May 17, 2007 **detention** hearing this Court ruled from the Bench and read into the record the sum and substance of this Opinion. This written Opinion formalizes the Court's ruling. A **detention** Order was entered on May 17, 2007. [Doc. No. 14]. Background On May 7, 2007, this Court signed a Complaint ...

...5 , appeared before this Court for an initial appearance on May 8, 2007. On that date an Order of Temporary **Detention** was entered and a **detention** hearing was scheduled for May 11, 2007. [Doc. No. 7]. On May 11, 2007, defendant's counsel requested and was granted an extension for the date of the **detention** hearing until May 17, 2007. Findings of Fact 2 FN2. All of the facts summarized herein were included in the government's proffer at the May 17, 2007 **detention** hearing which included the May 7, 2007 Complaint naming the defendant and the reports of Pre-trial Services. The proffer also...

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999 F.2d 541
999 F.2d 541, 1993 WL 280323 (C.A.6 (Tenn.))
(Cite as: 999 F.2d 541, 999 F.2d 541 (Table))

C
U.S. [redacted] Scott
C.A.6 (Tenn.),1993.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Robert D. SCOTT, Defendant-Appellant.
No. 92-6435.

July 26, 1993.

On Appeal from the United States District Court for the Western District of Tennessee, No. 91-20037,Gibbons, J.
W.D.Tenn.

AFFIRMED.

Before GUY and BATCHELDER, Circuit Judges, and MILES, Senior District Judge.[FN*]

PER CURIAM.

***1** Defendant, Robert Scott, appeals his conviction for interstate transportation of a female minor and other females for purposes of prostitution, interstate transportation of a minor with intent that she engage in sexual intercourse with him, and conspiracy. Scott contends that the Speedy Trial Act was violated both because of the time between his arrest and indictment and the time between indictment and trial. Scott also challenges the admission at trial of a book of sexually explicit photographs, which he alleges was irrelevant and unduly prejudicial. Finally, Scott argues that insufficient evidence existed to convict him of any of the counts against him. We affirm.

I.

Robert Scott was a 26-year-old native of Toledo, Ohio, who, according to one of his acquaintances, worked as a pimp. In November of 1990, Scott encountered Betty Frey, also a resident of Toledo, who told him that she was planning to run away. Frey was born on July 14, 1973, and was considered a minor on the day that she met Scott. Frey asked Scott to take her to a small town in Michigan, where she was going to "play it off with her mom." Presumably, Frey planned to call her mother long distance and tell her that she had run away simply to worry her. Scott complied with Frey's request and took her to Michigan. Once there, the couple went to a motel and had sexual intercourse.

At some point, Scott suggested that Frey accompany him to Columbus, Ohio. She agreed, and ultimately the pair traveled to Columbus on November 16 with Jeanine Sheppard, Theresa Riebesehl, and codefendant Derek Maes. The group checked into a Columbus motel, where Scott and Frey again had sexual intercourse. Scott then told Frey that he did not have enough money for them to return to Toledo and he therefore needed a favor from her. Scott wanted her to make some money by prostituting herself, and he gave Frey condoms and sent her out with Sheppard and Riebesehl. The three all engaged in sexual intercourse for money, and upon her return to the motel Frey gave Scott all of the money she made. This was the first time Frey had ever engaged in prostitution.

The group returned to Toledo the next day, where they stayed in an apartment with Maes and Betty Sims, Scott's live-in girlfriend. Throughout November and December of 1990, Scott sent Frey out on the streets of Toledo to engage in prostitution. Often, Frey was accompanied by Ruth DeBolt, Claudia Tinsley, and codefendant Kimberly Bull.

Late in December of 1990, Scott, Frey, Bull, DeBolt, and Tinsley left Toledo in Scott's automobile destined for Memphis, Tennessee. Maes,

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Sheppard, Riebesehl, Lisa Gonzales, and codefendant David Powers followed Scott in Maes' vehicle. According to the government, the purpose of this trip was for the females to make money by prostituting themselves. On the trip down, the cars would stop at rest areas and truck stops and the females would attempt to prostitute themselves to truck drivers and others. Near Elizabethtown, Kentucky, the caravan stopped for the night when Scott's car broke down. Scott, Maes, and Powers left the seven women at an Elizabethtown motel while they returned to Toledo to retrieve another vehicle. Prior to leaving for Toledo, however, Scott and Frey once again had sexual intercourse. While in Elizabethtown, DeBolt, Frey, and Tinsley went to a local tavern where DeBolt made $40 on a "date" with one of the men she met.

***2** When the three men returned the next day, the two carloads departed Elizabethtown for Memphis, Tennessee. They registered at a Days Inn Motel in Memphis at 4:15 a.m. on January 2, 1991. A motel security guard assisted four of the women with their luggage. On an elevator going up to their rooms, the guard commented that if the elevator stuck at least he would have company. One of the women retorted, "Well, you couldn't afford it." Later, codefendant Bull asked the guard whether he would like a "date," and also inquired where the "hookers hang out" in Memphis.

While in the motel in Memphis, codefendant Powers asked Frey to become his prostitute. As they were talking, Bull entered the room and she and Frey began to fight. Frey sustained scratches behind her ear and a bite mark on her arm from the scuffle. Scott also attacked Frey while the group was in Memphis, but this was not the first time that he had assaulted Frey. Scott's assault of Frey in Memphis was precipitated by Frey's request for bus money so she could return home to Toledo. After Scott denied her request, Frey called her mother and told her she had been beaten and needed money for a bus ticket home. Frey's mother then called Memphis police, who descended upon the Days Inn.

One of the items obtained by police was a photo album that contained several pictures of the parties involved in this case. The album, which was transferred to the trunk of Maes' car in Elizabethtown, Kentucky, after Scott's car broke down, included nude photos of several of the individuals and photos of some of the individuals engaged in oral sex. Frey testified that many of the photos were taken at the Columbus, Ohio, motel where the group stayed in November, but several other photos were taken while the group traveled from Toledo to Memphis.

Frey also testified that Scott had given her and the other women instructions about how to observe police vice officers. According to Frey, Scott had told them to look under the seat of customers' cars for a radio or a gun to "make sure they ain't vice." If the women found such items, they were to open the door of the car and flee.

On February 12, 1991, a grand jury returned a 10-count indictment against Scott and others in which Scott was named in eight of the counts. The charges against Scott included: (1) unlawful, knowing, and intentional transport of a minor in interstate commerce for purposes of prostitution in violation of 18 U.S.C. §§ **2422** and 2423; (2) knowing transport of a minor in interstate commerce with intent that she engage in sexual intercourse with Scott in violation of Tennessee Code Annotated § 39-13-506 and 18 U.S.C. § 2423; (3) knowing persuasion of a minor to travel in interstate commerce for purposes of prostitution in violation of 18 U.S.C. § **2422** ; (4) knowing interstate transport of individuals for purposes of prostitution in violation 18 U.S.C. §§ 2421 and **2422** ; and (5) conspiracy to transport individuals in interstate commerce for purposes of prostitution. Scott was found guilty on all eight counts and sentenced to 105 months in jail.

II.

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***3** Initially, Scott contends that he was neither indicted nor brought to trial within the time limit required by the Speedy Trial Act. The trial court found that any periods of delay in Scott's case were excludable under the Act. We agree.

According to 18 U.S.C. § 3161(b), an indictment against a defendant must be filed within 30 days from the date of the defendant's arrest. In this case, Scott was arrested on January 7, 1991. On January 29, the government moved for an extension of time to indict Scott because two witnesses that the government had subpoenaed failed to appear at a grand jury proceeding on that date. Pursuant to § 3161(h)(3)(A),[FN1] the district court granted the government an additional 30 days, commencing February 4, in which to obtain an indictment against Scott. The government did so on February 12, well within the additional time given it by the district court. Thus, Scott was indicted in a timely manner, and the district court did not abuse its discretion in granting the government additional time to bring an indictment given the absence of essential witnesses. *Cf. United States v. Cianciola,* 920 F.2d 1295, 1301 (6th Cir.1990) (analyzing Speedy Trial Act issues under an abuse of discretion standard), *cert. denied,*501 U.S. 1219, 111 S.Ct. 2830 (1991). Moreover, Scott has failed to show that actual prejudice resulted from the 36-day period between his arrest on January 7 and his indictment on February 12. *See United States v. Monger,* 879 F.2d 218, 222 (6th Cir.), *cert. denied,*493 U.S. 997 (1989) (requiring actual prejudice in order to obtain reversal of district court's decision to grant an excludable continuance of indictment or trial).

The Speedy Trial Act also requires that a defendant be brought to trial within 70 days following his indictment or first appearance before the court, whichever is later. *Cianciola,* 920 F.2d at 1298 (citation omitted). Scott and three codefendants were indicted on February 12, but the last defendant (David Powers) did not make an initial appearance in district court until April 3, 1991. No motion for severance had been granted, and the district court therefore determined that the 70-day period for commencement of trial began on that date. *See*18 U.S.C. § 3161(h)(7) (providing for "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted"). Scott's trial did not begin until October 21, 1990, over six months later. He contends that this length of time violated the commands of the Speedy Trial Act.

Between January and October 1991, approximately 45 pretrial motions were filed by the parties in this case. In rejecting Scott's motion to dismiss the indictment for violation of the Speedy Trial Act, the trial court considered several motions that provided a basis for excluding time. On April 11, for example, Scott's codefendant Kimberly Bull moved for new counsel. The trial court granted her motion, and new counsel was appointed on April 25. This time was considered excludable pursuant to 18 U.S.C. § 3161(h)(1)(F), which provides for excludable delay "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion[.]" The case was then set for trial on June 17, but Bull's counsel moved for a continuance to prepare for trial, and the case was reset for July 22. This time was also excluded. Finally, because at various times both the government and defense counsel moved for continuances due to their inability to locate material witnesses, the trial court moved the trial to October 21. This time was excluded pursuant to § 3161(h)(3)(A), which provides for excludable delay of any period "resulting from the absence or unavailability of the defendant or an essential witness."

***4** No evidence exists that the trial court abused its discretion in granting exclusions from the speedy trial period. Defendant has argued neither that the prosecution intentionally delayed the trial nor that he suffered actual prejudice. *See United States v. Williams,* 711 F.2d 748 (6th Cir.) (delay during pendency of motions may under some cir-

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cumstances constitute denial of right to speedy trial, but, absent evidence of intentional prosecutorial delay and actual prejudice to the defendant, right to speedy trial is not violated by delay while motions are pending), *cert. denied*464 U.S. 986 (1983). In addition, many of the pretrial motions that the trial court considered were brought by Scott or his codefendants. Given that the trial court properly computed exclusions from the 70-day speedy trial period, defendant was brought to trial within the time limits established by the Speedy Trial Act.

III.

Scott next contends that the trial court violated Federal Rules of Evidence 402 and 403 by allowing the admission of a photo album depicting Scott and several other individuals in various stages of undress and engaged in sexual activity. According to Scott, the pictures are not an element of any of the substantive crimes with which he is charged and are therefore irrelevant. Further, because some of the photos portray interracial sex, Scott argues that they are unduly prejudicial and would tend "to inflame racial and religious prejudices the jurors may harbor."

There is no question that this evidence has some relevance to the relationship among the parties. Some of the photos also showed the physical abuse that Betty Frey received, thereby corroborating the government's theory that she had been controlled by Scott. Thus, the admission of the photo album would not violate Federal Rule of Evidence 402, because the pictures have at least some relevance to this case.

The decision as to whether evidence is admissible under Rule 403 is left to the sound discretion of the trial court, and the value of the evidence must be substantially outweighed by its prejudicial character in order to justify its exclusion under Rule 403. *United States* [redacted] *Castro,* 908 F.2d 85, 88 (6th Cir.1990). We review this exercise of discretion "in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States* [redacted] *Zipkin,* 729 F.2d 384, 389 (6th Cir.1984).

The trial court reviewed carefully the evidence and found the photo album highly probative as to the relationship among the parties and as to their intent and purpose for travelling to Memphis. We agree. Although some of them were taken prior to the trip in question, the photos tend to establish that the parties knew one another intimately. That the pictures were in Scott's possession tends to establish that he exerted some control over the women. One of the photos also showed one of the women lying naked on a bed with money on her stomach. As the district court noted, such evidence is relevant to the question of whether the women traded sex for money.

***5** Scott's claim of unfair prejudice is groundless. Several courts have upheld the admission of sexually explicit photos in cases involving violations of the Mann Act. *See, e.g., United States* [redacted] *Boyd,* 610 F.2d 521 (8th Cir.1979), *cert. denied,*444 U.S. 1089 (1980); *United States* [redacted] *Harris,* 534 F.2d 207 (10th Cir.1975), *cert. denied,*429 U.S. 941 (1976). Moreover, the trial court questioned prospective jurors about their ability to view graphic photographs, some of which involved interracial sexual activity. The interracial nature of this case was evident when witnesses testified, and the photos simply constituted more evidence of the relationships among the individuals involved. The trial court did not abuse its discretion in allowing the admission of the photo album.

IV.

Finally, Scott challenges the sufficiency of the evidence necessary to convict him. Scott argues that the government did not prove that the dominant motive of the trip was to engage in prostitution. In addition, Scott contends that the government should have been required to prove that Scott knew that Betty Frey was a minor when he transported her

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across state lines. Alternatively, he suggests that his lack of knowledge as to Frey's age should have been an **affirmative defense** to the charges regarding his involvement with a minor.

In reviewing the sufficiency of the evidence, we must view the evidence, and all reasonable inferences from the evidence, in the light most favorable to the government. *United States* [redacted] *Gibson,* 675 F.2d 825, 829 (6th Cir.), *cert. denied,*459 U.S. 972 (1982). We must affirm the conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* [redacted], 443 U.S. 307, 319 (1979).

To support a conviction under the Mann Act, courts have required that a dominant purpose of the interstate transportation must be unlawful conduct. *See, e.g., United States* [redacted] *Prater,* 518 F.2d 817, 819 (7th Cir.1975) ("An intention that the women or girls shall engage in the conduct outlawed by [the Act] ... must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement.") (citations omitted). Scott argues that he and the others were travelling South to escape the cold Toledo winter. However, sufficient evidence existed to allow a reasonable juror to conclude otherwise. Scott and the others had travelled previously to Columbus, Ohio, to engage in acts of prostitution. In addition, testimony at trial established that many of the women solicited clients while at rest areas and truck stops. The "date" that DeBolt procured while the group was in Elizabethtown, Kentucky; the inquiries to the Memphis security guard about where the "hookers hang out" in Memphis; and the pictures contained in Scott's photo album all evinced Scott's intent to transport women across state lines to engage in prostitution.

***6** Knowledge that a girl is under 18 years of age when transported interstate is not part of the proof required of the government in order to sustain a conviction under 18 U.S.C. § 2423, and Scott's argument to the contrary is unavailing. The government proved, as it must, that Betty Frey was in fact a minor at the time of the interstate transportation by offering her testimony that she was born on July 14, 1973, and the interstate transportation occurred in late 1990 and early January of 1991. The Mann Act does not require more. *See, e.g., United States* [redacted] *Hamilton,* 456 F.2d 171, 173 (3d Cir.), *cert. denied,*406 U.S. 947 (1972).

Defendant argues that *Hamilton* and its progeny are wrongly decided, because it is unconstitutional to lessen the government's burden in these cases by not requiring the government to prove that the defendant knew of the victim's age. But, the legislature has wide latitude to declare what constitutes an offense against society and to define the elements that constitute such an offense. *Cf. Whalen* [redacted] *United States,* 445 U.S. 684, 689 (1980). It does not offend due process for Congress to draft a statute that does not require the prosecution to show that a defendant believed the victim to be under the age of 18 when she was transported interstate, because the law has traditionally afforded minors substantial protection from others. *See United States* [redacted] *Ransom,* 942 F.2d 775, 777 (10th Cir.1991) (discussing 18 U.S.C. § 2241, which prohibits those in the maritime and territorial jurisdiction of the United States and in a federal prison from knowingly engaging in a sex act with another who has not attained the age of 12, and rejecting claim that due process requires government to prove defendant's intent because "from ancient times the law has afforded special protection to those deemed too young to understand the consequences of their actions"), *cert. denied,*502 U.S. 1042, 112 S.Ct. 897 (1992).

Similarly, the Constitution does not require that a defendant be provided a defense of mistake of age when accused of a Mann Act violation involving a minor. *Cf. id.* at 776-78. Scott argues that the Equal Protection Clause is violated if he is unable to assert a defense of mistake, because Congress provided for such a defense when it enacted 18 U.S.C. § 2243, which criminalizes knowing engagement in a sexual act with another under the age

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of 16 by those in the maritime and territorial jurisdiction of the United States or in a federal prison. According to Scott, no rational basis exists for the distinction between the two statutes.

Scott was convicted of transporting a minor in interstate commerce with the intent that she engage in prostitution. He was also convicted for knowingly transporting a minor in interstate commerce with the intent that the minor would engage in sexual intercourse with him. Both of these convictions rested upon 18 U.S.C. § 2423, which provides:

Whoever knowingly transports any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be **charged** with **a criminal offense**, shall be fined under this title or imprisoned not more than ten years, or both.

***7** Assuming, without deciding, that Scott is sufficiently "similarly situated" to a defendant accused of statutory rape of a minor under the age of 16 within the territorial or maritime jurisdiction of the United States, we find that a rational basis exists for allowing the defense of mistake in 18 U.S.C. § 2243 and denying such a defense under the Mann Act. The latter Act criminalizes prostitution or other criminal sexual activity that involves interstate commerce. Thus, minors in particular will often be very far from their usual support systems when transported interstate, and it is rational for Congress to want to heighten protection of such minor victims by denying Mann Act defendants the defense of mistake. Moreover, the Equal Protection Clause is not offended by gradual, incremental change in the law. *See, e.g., Railway Express [redacted] New York,* 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."); *see also Dallas [redacted] Stanglin,* 490 U.S. 19, 26 (1990) ("[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' ") (citations omitted). Denying Scott the defense of mistake, then, does not violate the Constitution.

AFFIRMED.

FN* Honorable Wendell A. Miles, United States District Court for the Western District of Michigan, sitting by designation.

FN1. That section provides in pertinent part as follows:

The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

....

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

18 U.S.C. § 3161(h).

C.A.6 (Tenn.),1993.

U.S. [redacted] Scott

999 F.2d 541, 1993 WL 280323 (C.A.6 (Tenn.))

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159 Fed.Appx. 128
159 Fed.Appx. 128, 2005 WL 3438434 (C.A.11 (Fla.))
(Cite as: 159 Fed.Appx. 128)

C
U.S. [redacted] Clarke
C.A.11 (Fla.),2005.
This case was not selected for publication in the Federal Reporter.Please use FIND to look at the applicable circuit court rule before citing this opinion. Eleventh Circuit Rule 36-2. (FIND CTA11 Rule 36-2.)
United States Court of Appeals,Eleventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
[redacted] CLARKE, Defendant-Appellant.
No. 05-12303
Non-Argument Calendar.
D.C. Docket No. 04-20656-CR-CMA.

Dec. 15, 2005.

Background: Defendant was convicted in the United States District Court for the Southern District of Florida of attempting to obtain a minor to engage in a commercial sex act, attempting to travel in foreign commerce to engage in illicit sexual conduct with another person, and attempting to induce a minor to engage in prostitution, and he appealed.

Holdings: The Court of Appeals held that:

(1) in order to convict defendant of attempting to induce a minor to engage in prostitution, government was not required to prove that the prostitution in question was illegal country to which defendant intended to travel;

(2) trial court did not abuse its discretion in refusing to instruct jury regarding defense of entrapment by estoppel;

(3) trial court did not abuse its discretion in preventing defendant from making legal arguments in opening statement; and

(4) trial court did not abuse its discretion in prohibiting defendant from presenting expert psychiatric testimony.

Affirmed.

West Headnotes

[1] Prostitution 315H ⇐19(1)

315H Prostitution
315Hk19 Federal Offenses
315Hk19(1) k. In General. Most Cited Cases
In order to convict defendant of attempting to induce a minor to engage in prostitution, government was not required to prove that the prostitution in question was illegal in Costa Rica, the country to which defendant intended to travel in order to engage in prostitution with a minor. 18 U.S.C.A. § **2422**(b).

[2] Criminal Law 110 ⇐772(6)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k772 Elements and Incidents of Offense, and Defenses in General
110k772(6) k. Defenses in General. Most Cited Cases
In prosecution for attempting to travel in foreign commerce to engage in illicit sexual conduct and attempting to induce a minor to engage in prostitution, trial court did not abuse its discretion in refusing to instruct jury regarding defense of entrapment by estoppel; defendant did not allege that detective identified himself to defendant as law enforcement officer, defendant's reliance on statements made by detective in guise of owner of travel service that connected clients with prostitutes in Costa Rica was objectively unreasonable, and defendant pointed to no statements in record where he asked detective about legality of services provided or detective volunteered that services were legal.

[3] Criminal Law 110 ⇐704

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110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k702 Scope and Effect of Opening Statement
110k704 k. For Defense. Most Cited Cases

Criminal Law 110 ⇐730(2)

110 Criminal Law
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k730 Action of Court
110k730(2) k. Opening Statement. Most Cited Cases
In prosecution for attempting to travel in foreign commerce to engage in illicit sexual conduct and attempting to induce a minor to engage in prostitution, trial court did not abuse its discretion in limiting defendant's opening statement to prevent defendant from making legal arguments; defendant repeatedly disregarded court's ruling regarding use of legal terms such as "substantial steps" in opening argument, forcing government to object at each instance, and rather than merely stating evidence that would come out at trial, defendant argued he was led to believe by undercover detective that Costa Rican government tested prostitutes for diseases.

[4] Criminal Law 110 ⇐474

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 k. Mental Condition or Capacity. Most Cited Cases
In prosecution for attempting to travel in foreign commerce to engage in illicit sexual conduct and attempting to induce a minor to engage in prostitution, proposed expert psychiatric testimony describing witness's assessment of defendant's depression as an explanation that provided insight into motivations behind his actions, but not as an excuse for those actions, failed to support a legally acceptable theory demonstrating a lack of mens rea by negating either knowledge or intent, and thus, trial court did not abuse its discretion in prohibiting defendant from presenting the expert testimony.

***129** Anne R. Schultz, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.
Milton Hirsch and David Oscar Marcus, Miami, FL, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before BLACK, CARNES and PRYOR, Circuit Judges.

PER CURIAM:

****1** [redacted] Clarke appeals his convictions for attempting to obtain a minor to engage in a commercial sex act, 18 U.S.C. §§ 1591(a), 1594(a), attempting to travel in foreign commerce to engage in illicit sexual conduct with another person, 18 U.S.C. § 2423(c), (e), and attempting to induce a minor to engage in prostitution, 18 U.S.C. § **2422**(b). Clarke asserts the district court erred in its (1) interpretation of 18 U.S.C. § **2422**(b) when it denied Clarke's motion for judgment of acquittal, (2) refusal to instruct the jury on the defense of entrapment by estoppel, and (3) limitation of Clarke's opening statement and prohibition of expert psychiatric testimony. The district court did not err, and we affirm Clarke's convictions.

I. DISCUSSION

A. *Statutory interpretation of 18 U.S.C. § 2242(b)*

[1] Clarke asserts his conviction for persuading a minor to engage in prostitution "cannot stand," as he was neither charged with, nor could he have been convicted of, "engag[ing] in any sexual activity (including prostitution) for which any ***130** person can be charged with a crime." According to

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Clarke, § **2422**(b), as written, only makes it a crime to induce a minor to engage in any sexual activity if that sexual activity is criminal. Clarke claims the statutory construction, specifically, the lack of a comma following the word "prostitution," means the phrase "for which any person can be **charged** with **a criminal offense**" must be read to modify the prior phrase "prostitution or any sexual activity." Clarke further asserts based upon this statutory construction of § **2422**(b) that Congress only intended to punish a person for engaging in "illegal prostitution" overseas, but "not all forms of prostitution." Moreover, Clarke argues, although Congress has the power to criminalize the conduct of a U.S. citizen who engages in conduct in a foreign country that is deemed legal in that country, Congress only criminalized "engaging in underage prostitution *as defined and proscribed by the law of the jurisdiction in which the act of prostitution occurs.*" Accordingly, Clarke argues, the prosecution was required to, but did not, present evidence the type of prostitution in which he intended to engage was "the sort of prostitution for which any person can be charged with a crime in Costa Rica."

"The interpretation of a statute is a question of law subject to *de novo* review." *United States v. Murrell,* 368 F.3d 1283, 1285 (11th Cir.), *cert. denied,*543 U.S. 960, 125 S.Ct. 439, 160 L.Ed.2d 324 (2004) (citation omitted). Subsection (b) of § **2422** states:

Whoever, using the mail or any facility or means of interstate or foreign commerce ... 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 5 years and not more than 30 years.

****2** Clarke cites no authority to support his contention the phrase "for which any person can be **charged** with **a criminal offense**" must be read to modify both "prostitution" and "any sexual activity." Moreover, prostitution is a form of sexual activity, and Clarke's reading results in the term "prostitution" being superfluous, which must be avoided. *United States v. Ballinger,* 395 F.3d 1218, 1236 (11th Cir.) (en banc) (noting it is a cardinal principle of statutory construction that a statute must be construed such that no clause, sentence, or word shall be superfluous, void, or insignificant), *cert. denied,*--- U.S. ----, 126 S.Ct. 368, 163 L.Ed.2d 77 (2005). Finally, even if Clarke were correct that the Government was required to show the prostitution in question is illegal in Costa Rica, both Agent Patterson and Detective Love testified it is illegal to engage in prostitution with a minor in Costa Rica. Accordingly, the district court did not err in its interpretation of § **2422**(b).

B. *Jury instruction on entrapment by estoppel*

[2] Clarke next contends the district court erred by failing to give an entrapment by estoppel instruction to the jury, as he provided sufficient evidence for the matter to go to the jury. Clarke contends whether he knew Detective Richard Love was acting on behalf of the Federal Bureau of Investigation is irrelevant, as the defense of entrapment by estoppel focuses on the conduct of government officials, rather than on the defendant's state of mind. Clarke explains "law enforcement may not benefit from its own wrongful act," whereby a citizen is prosecuted for engaging in criminal conduct that law enforcement counseled him to undertake. Clarke asserts his reliance on Detective ***131** Love was reasonable, especially since Detective Love held himself out to be "a very experienced, qualified, law-abiding purveyor of sex tourism." Moreover, Clarke argues, he was assured by Detective Love the prostitutes were required to be tested for diseases once a month, and Detective Love "acknowledged that the logical and ordinary inference from his representation ... was that it was the government of Costa Rica that imposed such a requirement." Clarke further argues both Detective Love and the website assured him the sexual activities being offered were "safe" and "secure." Ac-

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cording to Clarke, the representations of Detective Love and the website "told a single, consistent, coherent story: the sex tourism being offered to [him] was legal."

The denial of a requested jury instruction is reviewed for an abuse of discretion. *United States* [redacted] *Trujillo,* 146 F.3d 838, 846 (11th Cir.1998). "The trial court has authority to refuse to instruct the jury on a defense where the evidence used to support it, if believed, fails to establish a legally cognizable defense." *United States* [redacted] *Billue,* 994 F.2d 1562, 1568 (11th. Cir.1993). To assert the defense of entrapment by estoppel, a defendant must " 'actually rely on a point of law misrepresented by an official of the state; and such reliance must be objectively reasonable-given the identity of the official, the point of law represented, and the substance of the misrepresentation.' " *United States* [redacted] 179 F.3d 1328, 1332 (11th Cir.1999) (citation omitted). "The defense 'focuses on the conduct of the Government officials, not on the state of mind of the defendant.' " *Id.* (citation omitted).

****3** Clarke does not allege Detective Love ever identified himself to Clarke as a law enforcement officer. Clarke knew Detective Love as his alias, Richard Baxter, the owner of CRTV, who provided a travel service whereby clients were connected with prostitutes in Costa Rica. Accordingly, Clarke's reliance on statements made by Detective Love, in the guise of Richard Baxter, was objectively unreasonable, as a reasonable person would not rely upon a pimp for legal guidance. *See id.* Moreover, Clarke points to no statements in the record where he either asked Detective Love about the legality of the services provided by CRTV or Detective Love volunteered that CRTV's services were legal. On the contrary, Detective Love instructed Clarke what Clarke was doing was not "kosher," and Clarke responded he "knew that" and figured as much. Contrary to Clarke's contentions, the terms "secure" and "safe" are not synonymous with "legal." Moreover, Detective Love's statements he occasionally had sex with the prostitutes does not indicate such behavior was legal. Furthermore, as the district court noted, the only "affirmative statement" made by Detective Love, that the prostitutes were required to be tested monthly for disease, was subsequently followed in the conversation by Detective Love's statement to Clarke that the conduct in which he intended to engage was not kosher. Accordingly, the district court did not abuse its discretion by refusing to instruct the jury regarding the defense of entrapment by estoppel.

C. *Fair trial*

Finally, Clarke asserts the "cumulative effect of adverse evidentiary and procedural rulings by the trial court deprived [him] of a fair trial under the 5th and 6th Amendments." According to Clarke, the district court "unfairly limited" his opening statement by (1) excluding the board he intended to use a visual aid, and (2) sustaining objections by the Government when he stated the evidence would show he had not taken any "substantial steps" and law enforcement officers led him to ***132** believe the Costa Rican government tested the prostitutes for diseases. Clarke contends as a result he was prevented from "laying two essential building blocks" of his defense, that the evidence would show (1) he had not taken the "substantial step" to distinguish his "non-criminal" conduct from criminal attempt, and (2) law enforcement officers led him to believe the conduct he was planning was "not proscribed by criminal sanctions." Clarke further contends he was prevented from presenting testimony, which supported his defense, by Dr. Haber, who would have testified Clarke (1) was not a pedophile, (2) was not sexually aroused by or attracted to prepubescent females, and (3) suffers from clinical depression.

We review for an abuse of discretion Clarke's claim the district court improperly limited his opening statement. *See United States* [redacted] *Burns,* 298 F.3d 523, 543 (6th Cir.2002) (stating a district judge's conduct of a trial, including opening statements, is reviewed for an abuse of discretion). "A district

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court's decision regarding the admissibility of psychiatric evidence is generally subject to the abuse of discretion standard of review." *United States v. Westcott,* 83 F.3d 1354, 1357 (11th Cir.1996).

****4** An opening statement gives counsel the opportunity to state what evidence will be presented in order to make it easier for the jurors to understand what is to follow, and is not an occasion for argument. *See United States v. Zielie,* 734 F.2d 1447, 1455 (11th Cir.1984), *abrogated on other grounds by United States v. Chestang,* 849 F.2d 528, 531 (11th Cir.1988). "The scope and extent of the defendant's opening statement rests largely in the discretion of the trial court." *United States v. Freeman,* 514 F.2d 1184, 1192 (10th Cir.1975). The court "can exclude irrelevant facts and stop argument if it occurs." *Zielie,* 734 F.2d at 1455.

The Insanity Defense Reform Act provides:

It is an **affirmative defense** to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

18 U.S.C. § 17(a). When evaluating the admissibility of psychiatric evidence, courts should consider the following principles: (1) "[p]sychiatric evidence of impaired volitional control or inability to reflect on the ultimate consequences of one's conduct is inadmissible whether offered to support an insanity defense or for any other purpose;" (2) "Congress intended to insure that the insanity defense is not improperly resurrected in the guise of showing some other ***affirmative defense*** such as that the defendant had a 'diminished responsibility' or some similarly asserted state of mind which would serve to *excuse* the offense;" and (3) "Congress was concerned about the danger that expert psychiatric testimony regarding inherently malleable psychological concepts can be misused at trial to mislead or confuse the jury." *United States v. Cameron,* 907 F.2d 1051, 1061-62 (11th Cir.1990) (internal quotation and citation omitted) (emphasis in original). "Evidence offered as 'psychiatric evidence to negate specific intent' is admissible, however, when such evidence focuses on the defendant's specific state of mind at the time of the charged offense." *Id.* at 1067. "Because psychiatric evidence (1) will only rarely negate specific intent, (2) presents an inherent danger that it will distract the jury[ ] from focusing on the actual presence or absence of *mens rea,* ***133** and (3) may easily slide into wider usage that opens up the jury to theories of defense more akin to justification, district courts must examine such psychiatric evidence carefully to ascertain whether it would, if believed, support a legally acceptable theory of lack of *mens rea." Id.* (internal quotations and citation omitted).

As an initial matter, Clarke failed to include the board he intended to use as a visual aid in the record on appeal, as required by Federal Rule of Appellate Procedure 10(b)(2). *See Fernandez v. United States,* 941 F.2d 1488, 1493 (11th Cir.1991) (holding the appellant is responsible for ensuring all documents buttressing his claims appear in the record). Consequently, we are unable to determine whether the district court abused its discretion by determining Clarke could display only the left-hand side during his opening statement.

****5** [3] Prior to Clarke's opening statement, the court ruled he was prohibited from making legal argument in his opening statement. Clarke, however, repeatedly disregarded the court's ruling regarding the use of legal terms such as "substantial steps," using such language and forcing the Government to object at each instance. In addition, rather than merely stating the evidence that would come out at trial regarding Detective Love's telling him the prostitutes were required to be tested, Clarke argued he was led to believe the Costa Rican government tested the prostitutes for diseases. Contrary to Clarke's contentions, he did not have a right to make legal arguments in his opening statement. *See Zielie,* 734 F.2d at 1455. Moreover, a court is per-

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mitted to stop a party from arguing during its opening statement, as occurred in the present case. *See id.* Accordingly, the district court did not abuse its discretion by prohibiting Clarke from making legal arguments during his opening statement.

[4] Clarke also claims the district court abused its discretion by prohibiting expert psychiatric testimony. At the hearing, Dr. Haber testified Clarke intended to take the actions necessary to travel to Costa Rica, and knew what he was "signing up for was not legal." Dr. Haber also testified Clarke was conscious of his actions, had the capacity for self-reflection over the course of the telephone conversations, and had "a requisite understanding of his actions and their consequences." Dr. Haber described her assessment of Clarke's depression as an explanation that provided insight into the motivations behind his actions, but was not an excuse for those actions. Accordingly, even if believed, Dr. Haber's testimony failed to support a legally acceptable theory demonstrating a lack of *mens rea,* but, on the contrary, as she stated, only served to explain Clarke's actions, rather than negate either the knowledge or intent behind those actions. *See Cameron,* 907 F.2d at 1067. Consequently, the district court did not abuse its discretion in prohibiting Clarke from presenting expert psychiatric testimony.

II. CONCLUSION

The district court did not err in its interpretation of 18 U.S.C. § **2422**(b). Additionally, the district court did not abuse its discretion when it refused to instruct the jury on the defense of entrapment by estoppel or by limiting Clarke's opening statement and prohibiting expert psychiatric testimony. We affirm Clarke's convictions.

AFFIRMED.

C.A.11 (Fla.),2005.
U.S. [redacted]. Clarke
159 Fed.Appx. 128, 2005 WL 3438434 (C.A.11 (Fla.))

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--- F.3d ----
--- F.3d ----, 2008 WL 581218 (C.A.11 (Fla.))
(Cite as: --- F.3d ----)

UNITED STATES OF AMERICA, Plaintiff-Appellee, [redacted] DONALD J. **DEVERSO**, Defendant-Appellant.
C.A.11,2008.

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
DONALD J. **DEVERSO**, Defendant-Appellant.
No. 06-16048 D.C. Docket No. 05-00034 CR-FTM-29-SPC

United States Court of Appeals, Eleventh Circuit.
(March 5, 2008)

Appeal from the United States District Court for the Middle District of Florida

Before DUBINA and KRAVITCH, Circuit Judges, and GOLDBERG,* Judge.

DUBINA, Circuit Judge:DUBINA, Circuit Judge:

Appellant Donald J. Deverso ("Deverso") appeals his convictions for possessing materials involving a depiction of a minor engaged in sexually explicit activity, in violation of 18 U.S.C. § 2252(a)(4)(B) and (b)(2) (Count One); transporting materials involving a depiction of a minor engaged in sexually explicit activity, in violation of 18 U.S.C. § 2252(a)(1) and (b)(1) (Count Two); [FN1] and using a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct and transporting that visual depiction into the United States, in violation of 18 U.S.C. § 2251(c)(2)(B) and (e) (Count Three). Deverso's appeal presents three issues for review, two of which present novel questions concerning the authenticity of foreign public documents under Federal Rule of Evidence 902(3) and a mistake of age defense under 18 U.S.C. § 2251(c). After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we conclude that the Government properly authenticated the foreign document it admitted into evidence, and Count Three does not contain a scienter element as to age. Accordingly, we affirm Deverso's convictions.

I. BACKGROUND

The Government presented the following evidence at trial. In 2004, the Department of Homeland Security ("DHS") received information regarding Deverso's foreign travel and began investigating him for possessing child pornography and traveling abroad to engage in sex with minors. DHS investigators interviewed Deverso's wife, Zong Yu Deverso ("Mrs.Deverso"). Mrs. Deverso turned over to investigators various computer media and printouts that she surreptitiously obtained from Deverso. Deverso was in some of the pictures that depicted young girls in various stages of undress. Investigators discovered that one of the girls in the pictures was Beverly Datanagan ("Beverly").

During a subsequent search of Deverso's residence pursuant to a valid search warrant, investigators found compact and floppy disks, computer components, and a computer. Deverso originally set up his computer in a small room or closet that the family used for a nursery. It was the only computer with internet access, and Deverso's account was the only account that was password protected. Investigators reviewed the compact disks seized from Deverso's residence and discovered two disks, entitled MM Texas and Asians 7, that contained child pornography. One of the investigators testified that he had seen some of the images on the compact disks in other child pornography investigations.

One of Deverso's fellow inmates, Michael Lewis ("Lewis"), testified that Deverso admitted that he had been involved with two underage girls in Manila, Philippines, during his relationship with his "fiancee" Beverly. Lewis also stated that Deverso admitted that the disks belonged to him but that he intended to shift the blame to his son, who

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was living with Deverso at the time of the search. Lewis testified that Deverso commented to him "that we all have a little pedophile in us." (R. Vol.6, p. 429.)

Investigators also testified that they found Beverly's name on the back of one of the digital images and discovered romantic email chats between Deverso and Beverly. Under Deverso's account and in a folder titled Bev, investigators found pictures of Beverly, some of which were sexually explicit. Deverso allegedly took these pictures between October 15 and 17, 2004.

Dante Orate ("Orate"), Special Agent with DHS in Manila, testified that he personally met with Beverly after authorities helped him locate her. Beverly brought a birth certificate for Orate to review. Orate requested a copy of the birth certificate from the National Census and Statistics Office and had it certified at the U.S. Embassy. Orate stated that the copy of the birth certificate was exactly the same as the birth certificate Beverly showed him at their meeting. The date of birth on the copy of the birth certificate was November 10, 1986. The Government proffered the document as evidence that Beverly was a minor at the time Deverso had sex with her, and Deverso objected on the grounds that the document was an incomplete document because it did not have a signature under the heading "Certificate of Attendant at Birth." (R. Vol.6, p. 322.)

Beverly testified that her date of birth was November 10, 1986, and she was 17 when she met Deverso in October 2004. She stated that she had sex with Deverso when she was 17, and she told Deverso that she was 17. She also testified that Deverso sent her money for her 18th birthday.

After the Government concluded its case-in-chief, Deverso moved for judgments of acquittal on all counts and moved for dismissal of Count Two, arguing that it was unconstitutional facially and as-applied. The district court denied the motions.

Deverso took the stand and denied having sex with Beverly in October 2004. Deverso also stated that Beverly did not tell him that she was 17; instead, Beverly represented herself to be 18 or 19. Deverso testified that the hotel clerk did not inquire about Beverly's age when they registered, and no one questioned her age when they purchased alcoholic drinks. Deverso stated that he sent Beverly money for her 19th, not 18th, birthday. Deverso also denied telling his fellow inmate anything about his travels or having sex with minors. He commented that his testimony was the truth.

During the charge conference, Deverso objected to an instruction that "the defendant's awareness of the age of the minor is not an element of the offense," and that mistake of age is not a defense to Count Three. Instead, Deverso requested that the district court instruct the jury that mistake of age is, in fact, an affirmative defense to Count Three. The Government responded that the instruction was a correct statement of the law. The district court concluded that because knowledge of age is not an element of 18 U.S.C. § 2251, mistake of age is not a defense.

The jury found Deverso guilty on all counts. The district court sentenced him to concurrent terms of 120 months imprisonment on Count One and 195 months imprisonment on Counts Two and Three. Deverso filed a timely notice of appeal.

II. ISSUES

1. Whether the district court erred in admitting a certified copy of a birth certificate as a foreign public document pursuant to Federal Rule of Evidence 902(3).

2. Whether the district court abused its discretion in refusing to instruct the jury on mistake of age on Count Three.

3. Whether the district court erred in denying Deverso's motion for judgment of acquittal on Count One.

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III. STANDARDS OF REVIEW

We review for abuse of discretion the district court's admission of evidence. *See United States v. Maragh,* 174 F.3d 1202, 1204 (11th Cir.1999). If the defendant fails to object at trial to the admission of evidence, the court reviews the district court's ruling for plain error only. *United States v. Baker,* 432 F.3d 1189, 1202 (11th Cir.2005). "Where an appellant has objected to a jury instruction at trial, we review the court's decision to use that instruction for abuse of discretion." *United States v. Dean,* 487 F.3d 840, 847 (11th Cir.2007), *petition for cert. filed,*76 U.S.L.W. 3240 (U.S. Oct. 25, 2007) (No. 07-553). "We review a district court's decision to deny a motion for judgment of acquittal based on sufficiency of the evidence de novo." *United States v. Dulcio,* 441 F.3d 1269, 1276 (11th Cir.2006). In determining whether the Government presented sufficient evidence, the court "must review the evidence in the light most favorable to the [G]overnment and draw all reasonable factual inferences in favor of the jury's verdict." *Id.*

IV. DISCUSSION

A. *Admission of the birth certificate*

Deverso argues that the district court erred in admitting a copy of Beverly's birth certificate into evidence to establish that Beverly was under the age of 18 at the time of the alleged sexual encounter. First, he claims that the birth certificate is a business record, and the Government did not lay a proper foundation for its admission. *See*28 U.S.C. § 1732 (governing admission of business records into evidence). Second, Deverso contends that the Government did not authenticate the birth certificate, and the document did not bear the required indicia of reliability. He claims that while the birth certificate may have been attested to by an appropriate individual listed in Federal Rule of Evidence 902(3), the document itself does not contain the minimum information to appear valid on its face. Deverso questions the authenticity of the document because the certificate states that it certifies that "Beverly Regidor Datanagan who was *allegedly* born on November 10, 1986 ... appears in the National Indices for birth." (R. Exhibit No. 5.) Thus, Deverso argues that the document is not what the Government claims it to be-a birth certificate-but is, instead, a document containing an "alleged" date of birth.

A review of the record indicates that Deverso objected to the admission of the document on the grounds that what purports to be a copy of the original or certified copy of the original does not have a signature under the heading "Certificate of Attendant at Birth." Specifically, he claimed that it was an incomplete document. (R. Vol.6, p. 322.) This trial objection is different than the objections Deverso proffers on appeal. Consequently, to obtain relief, Deverso must demonstrate plain error warranting relief. *See United States v. Cotton,* 535 U.S. 625, 631-32, 122 S.Ct. 1781, 1785 (2002) ("[B]efore an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights ... [and] (4) ... seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."(quoting *Johnson v. United States,* 520 U.S. 461, 466-67, 117 S.Ct. 1544, 1549 (1997) (internal citations and quotation marks omitted)).

The Government admitted the document as a foreign public document pursuant to Federal Rule of Evidence 902(3). This rule provides, in part, that

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to ... (3) **Foreign public documents.** A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a

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chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of an embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

FED. R. EVID. 902(3).

There is no requirement in Rule 902(3) that the document itself be signed. *See United States v. Squillacote,* 221 F.3d 542, 562 (4th Cir.2000). "The rules are written in the alternative-foreign documents may be authenticated by a certification from the official executing the document *or* by an official attesting to the document." *Id.*

There are two requirements for the authentication of a foreign document. "First, there must be some indication that the *document* is what is purports to be. Thus, the proffered document must be executed by a proper official in his official capacity, or the genuineness of the document must be attested to by a proper official in his official capacity." *Id.; see also United States v. Doyle,* 130 F.3d 523, 545 (2d Cir.1997) (noting that the rule is not concerned with establishing the truth of information contained in the proffered document but, instead, is concerned only with "assuring that evidence is what it purports to be"). "Second, there must be some indication that the *official* vouching for the document is who he purports to be." *Squillacote,* 221 F.3d at 562. Accordingly, "the rules require that one of a specified group of foreign officials must issue a final certification attesting to the genuineness of signature and title of the person executing or attesting to the document, or of another official who has certified the signature and position of the person executing or attesting to the document." *Id.*

The Government met these requirements here. The Government established that Agent Orate requested and obtained a copy of Beverly's birth certificate from the Philippine National Census and Statistics Office and that he had the copy authenticated and certified at the United States Embassy in Manila. The copy of Beverly's birth certificate was accompanied by a certificate from Richard Ambrad, Embassy Coordinator with the Government of the Philippines, attesting that the copy of Beverly's birth certificate was a true copy of an official record authorized by the law of the Philippines to be reported and recorded in the National Census and Statistics Office. That certification was accompanied by a final certification by Kimberly A. Russell, Vice Consul of the United States in the Philippines. Additionally, the copy of the birth certificate was stamped as a certified copy and affixed with the seal of Luzviminda N. Cruz, whom Vice Consul Russell certified was "Clerk II, National Statistics Office, Quezon City, Republic of the Philippines." Because the Government met the requirements for self-authentication of the foreign document, it did not have to lay a foundation for admission of the document as a business record. *See*FED.R.EVID. 902, advisory committee note to para. (3) (stating that this paragraph "provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification").

Furthermore, to the extent that Deverso challenges the reliability of the information contained in the birth certificate, such as Beverly's date of birth and the lack of signature of the attendant at birth, that challenge goes to the weight of the evidence, not its admissibility on grounds of authenticity. *See, e.g., Doyle,* 130 F.3d at 545 ("[T]he official does not need to attest to the truth or trustworthiness of the facts contained in the document; accuracy of its contents is the concern of other Federal Rules."). Deverso fails to establish that Beverly's birth certificate is not what it purports to be, especially in light of Agent Orate's testimony that the

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certified copy of the birth certificate was identical to the birth certificate that Beverly showed him upon request. Consequently, Deverso cannot show error, let alone plain error, warranting a new trial due to the district court's admission of the birth certificate into evidence.

B. *Mistake of age jury instruction*

Deverso claims that the district court erred by refusing to give his mistake of age instruction as to Count Three. Deverso contends that knowledge of age is constitutionally mandated and because the Government charged that he did "knowingly" employ, use, persuade, entice, or coerce a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct, he could raise mistake of age as a defense. The Government responds that the district court properly refused to give a mistake of age instruction. We agree.

Pursuant to 18 U.S.C. § 2251(c)(1),

[a]ny person who, in a circumstance described in paragraph (2), employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct outside of the United States, its territories or possessions, for the purpose of producing any visual depiction of such conduct, shall be punished as provided under subsection (e).

Id.

Subsection (2) states that the circumstance referred to in paragraph (1) is that -

(A) the person intends such visual depiction to be transported to the United States, its territories or possessions, by any means, including by computer or mail; or

(B) the person transports such visual depiction to the United States, its territories or possessions, by any means, including by computer or mail.

18 U.S.C. § 2251(c)(2). The statute sets the age of majority at 18. 18 U.S.C. § 2256(1).

Deverso first contends that he was entitled to a mistake of age defense jury instruction because knowledge of age is an element of the offense under § 2251. We disagree and hold that knowledge of age is not an element of this offense. *See United States [redacted] X-Citement Video, Inc.,* 513 U.S. 64, 76 & n.5, 115 S.Ct. 464 (1994) (concluding, although in dicta, that a mistake of age defense to 18 U.S.C. § 2251 is not constitutionally mandated and citing a Senate Conference Committee Report explaining that the deletion of the word "knowingly" from § 2251 reflected an intent to eliminate knowledge of age as an element of the crime); *United States [redacted] Griffith,* 284 F.3d 338, 349 (2d Cir.2002) (rejecting defendants' argument that the district court's charge to the jury omitting scienter of age under § 2251 was erroneous); *United States [redacted] Johnson,* 376 F.3d 689, 693 (7th Cir.2004) (finding that because defendant was charged with the attempt to manufacture child pornography, the Government had to prove knowledge of the minor's age; however, commenting that if the defendant were charged with the commission of the completed offense under § 2251, the Government would not have to prove knowledge of the minor's age); *United States [redacted] U.S. Dist. Ct.,* 858 F.2d 534, 538-41 (9th Cir.1988) (acknowledging that scienter as to age is not an element of 18 U.S.C. § 2251); H.R.REP. NO. 99-910, at 6 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5952, 5956 (noting that under § 2251 the Government "need not prove that the defendant actually knew the person depicted was in fact under 18 years of age").

Deverso also argues that he was entitled to a mistake of age jury instruction because it is constitutionally mandated. He relies on *United States District Court,* 858 F.2d at 537-43, in which the Ninth Circuit engrafted a mistake of age defense into the statute after concluding that such a defense was required under the First Amendment although the statute did not have a scienter of age element. We reject Deverso's contention and hold that the Constitution does not mandate a mistake of age defense under § 2251. *See United States [redacted] Crow,* 164

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F.3d 229, 236 (5th Cir.1999) (finding defendant's constitutional challenge to § 2251 meritless); *cf. Gilmour [redacted] Rogerson,* 117 F.3d 368, 370-73 (8th Cir.1997) (considering Iowa statute similar to § 2251 and concluding that the First Amendment does not mandate a mistake of age defense to the offense of sexual exploitation of a minor). Accordingly, we reject Deverso's argument that the district court erred in its jury instruction on Count Three. FN2

C. Motion for judgment of acquittal

Deverso contends that the district court erred in denying his motion for judgment of acquittal on Count One, possession of materials containing child pornography. He argues that the evidence was insufficient to support his conviction. Having reviewed the record, and taking the evidence in the light most favorable to the Government, *see Dulcio,* 441 F.3d at 1276, we conclude that the evidence was more than sufficient to support Deverso's conviction on Count One.

The evidence showed that after his arrest, Deverso admitted to another inmate that the disks belonged to him but that he intended to put the blame on his son, and that he had had sex with underage girls while he was in the Philippines. Additionally, an investigator testified that some of the child pornography contained on one of the disks had been found under Deverso's password-protected account on the hard drive of his computer. The investigator also stated that some of the child pornography on the disks contained the same images he had seen in other child pornography investigations. Deverso's son testified that none of the computer stuff belonged to him and that his father's account was the only account that was password-protected.

Although Deverso testified and denied any knowledge of the child pornography on the disks, the jury was free to disbelieve his testimony in light of the evidence to the contrary. Given the opportunity to evaluate Deverso's demeanor and credibility, the jury was entitled not only to disbelieve his testimony but, in fact, to find that the opposite of his testimony was true. *See United States [redacted] Martinez,* 83 F.3d 371, 374-75 (11th Cir.1996); *United States [redacted] Brown,* 53 F.3d 312, 314-15 (11th Cir.1995). Thus, Deverso's testimony in his own defense, coupled with the corroborative evidence of his guilt, supports the jury's guilty verdict. *See United States [redacted] Williams,* 390 F.3d 1319, 1326 (11th Cir.2004) ("Where some corroborative evidence of guilt exists for the charged offense ... and the defendant takes the stand in [his] own defense, the [d]efendant's testimony, denying guilt, may establish, by itself, elements of the offense."). Accordingly, we conclude that the district court did not err in denying Deverso's motion for judgment of acquittal on Count One.

[redacted]. CONCLUSION

For the foregoing reasons, we affirm Deverso's convictions.

AFFIRMED.

*Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

1. Deverso does not have a challenge with regard to the scienter instruction on Count Two because the district court gave a scienter jury instruction on this count. (R. Vol.8, p. 709-10.)

2. We note, moreover, that the Government's inclusion of the word "knowingly" in the indictment was mere surplusage. Congress defines the elements of an offense, not the charging document. Surplusage in an indictment may be deleted without any legal error. *See United States [redacted] Ward,* 486 F.3d 1212, 1227 (11th Cir.2007), *cert. denied,*128 S.Ct. 398 (2007). Furthermore, when the Government explained that it had charged "knowingly" to mean only that Deverso

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> must have "knowingly produced the images, he knowingly took the pictures," Deverso did not dispute that construction of Count Three, nor did he argue that he had relied on the language of the charge in formulating his defense. *See United States* [redacted] *Cancelliere,* 69 F.3d 1116, 1121 (11th Cir.1995) (noting exception to the general rule regarding surplusage in the indictment when a defendant rests his entire defense on an erroneously charged surplus ele- ment).

C.A.11,2008.
U.S. [redacted]. Deverso
--- F.3d ----, 2008 WL 581218 (C.A.11 (Fla.))

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FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

05 AUG 31 PM 2:12

UNITED STATES OF AMERICA

v.

DONALD J. DEVERSO

CASE NO. 2:S05-cr-34-FtM-29SPC
18 USC § 2251(c)(2)(B)
18 USC § 2251(e)
18 USC § 2252(a)(1)
18 USC § 2252(a)(4)(B)
18 USC § 2252(b)(1)
18 USC § 2252(b)(2)

SECOND SUPERCEDING INDICTMENT

The Grand Jury charges:

COUNT ONE

From a date unknown but by at least May 11, 2002, through on or about April 5, 2005, in Lee County, Florida, in the Middle District of Florida, and elsewhere, the defendant,

DONALD J. DEVERSO,

did knowingly possess one or more matter(s) which contain a visual depiction that had been transported in interstate and foreign commerce, and which had been produced using materials which had been transported, by any means including by computer, where the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct.

In violation of Title 18, United States Code, Sections 2252(a)(4)(B) and 2252(b)(2).

COUNT TWO

On or about October 20, 2004, in Lee County, in the Middle District of Florida, and elsewhere, the defendant,

DONALD J. DEVERSO,

did knowingly transport and ship in interstate and foreign commerce, by any means, including by computer, a visual depiction, the production of which involved the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct.

In violation of Title 18, United States Code, Sections 2252(a)(1) and 2252(b)(1).

COUNT THREE

Between October 15, 2004, through on or about October 17, 2004, in Lee County, in the Middle District of Florida, and the Philippines, the defendant,

DONALD J. DEVERSO,

did knowingly employ, use, persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct, and did transport such visual depiction to the United States by any means, including by computer, and which visual depiction had actually been transported in interstate and foreign commerce and mail.

In violation of Title 18, United States Code, Section 2251(c)(2)(B) and 2251(e).

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FORFEITURE

1. The allegations contained in Counts One through Three, of this Second Superceding Indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeitures pursuant to the provision of Title 18, United States Code, Section 2253.

2. The defendant, Donald J. Deverso, shall forfeit to the United States of America, any visual depiction described in section 2251, 2251A, or 2252 of this chapter, or any book, magazine, periodical, film, videotape, or other matter which contains any such visual depiction, which was produced, transported, mailed, shipped or received in violation of this chapter; any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense; and any property, real or personal, used or intended to be used to commit or to promote the commission of offense.

3. If any of the property described above, as a result of any act or omission of the defendant:

   a. cannot be located upon the exercise of due diligence;

   b. has been transferred or sold to, or deposited with, a third party;

   c. has been placed beyond the jurisdiction of the court;

   d. has been substantially diminished in value; or

   e. has been commingled with other property which cannot be divided without difficulty,

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the United States of America shall be entitled to forfeiture of substitute property under the provision of Title 18, United States Code, Section 2253(o).

A TRUE BILL,

8.31.05
Date

Reggy Mattox
Foreperson

PAUL I. PEREZ
United States Attorney

By: Yolande D. Viacava
Yolande G. Viacava
Assistant United States Attorney
Trial Counsel

By:
Robert P. Bardlift
Assistant United States Attorney
Asset Forfeiture

By:
Douglas Molloy
Assistant United States Attorney
Chief, Fort Myers Division

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FORM OBD-34 APR 1991

UNITED STATES DISTRICT COURT
Middle District of Florida
Fort Myers Division

THE UNITED STATES OF AMERICA

vs.

DONALD J. DEVERSO

SECOND SS INDICTMENT

Violations:

Title 18, United States Code, Sections 2251(c)(2)(B), 2251(e), 2252(a)(1), 2252(a)(4)(B), 2252(b)(1), and 2252(b)(2).

A true bill,

Foreperson

Filed in open court this 31st day
of August, A.D. 2005.

Clerk

Bail $_____

GPO 863 525

EFTA00192223

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA	:	
	:	
v.	:	CASE NO. 2:S05-cr-34-FtM-29SPC
	:	
DONALD J. DEVERSO	:	

GOVERNMENT'S NOTICE OF INTENT TO INTRODUCE EVIDENCE UNDER FED. R. EVID. 404(b)

The United States of America, by Paul I. Perez, United States Attorney for the Middle District of Florida, notifies this Honorable Court and all counsel that it intends to introduce evidence, pursuant to Fed. R. Evid. 404(b), of other crimes, wrongs or acts the defendants committed before, during, and after the dates of the offenses alleged in the Indictment.

1. The Government will present evidence that the defendant took numerous trips to various countries to engage in sexual intercourse with minors. The defendant made these trips to Asian countries, according to passport records and statements of the defendant.

2. The Government will present evidence that the defendant had numerous e-mail "relationships" with a number of women, both of age and under age. The Government will present evidence that the defendant convinced these women and girls that they were his "fiances". These women and girls include Chona Rama, a young Filipino girl, Beverly Datanagen, and others. The e-mail addresses include: daintygirl; jeandj2005; marychel; arbieanoba; honeygirl; toughgirl; promise of love; cudlyshane; and others. The Government will present computer print-out evidence of the e-mails

from the defendant that the defendant demanded sex from the women and girls in each of these "relationships" before marriage, so that: "I can be sure the marriage is a good one". There were no real "fiances"; the defendant was married and attempting to have sex with underage women.

3. The Government will present evidence the defendant showed member(s) of his family pictures of young girls upon returning from various trips out of the country, declaring he had sex with these underage women. The defendant stated he "purchased these girls for a bachelor party I threw myself". The defendant showed member(s) of his family a CD containing bestiality.

4. The Government will present evidence the defendant frequently visited on-line sites: www.porphilez.com; www.asianteen.org; www.asiangirls.com; www.freesexasia.com; and www.asianexploitedteen.com.

5. The Government will present evidence member(s) of the defendant's family saw him viewing child pornography in the defendant's home from January 2003 up to and including this year. The defendant showed member(s) of his family child pornography, telling member(s) of his family when abroad he could have sex with "a girl of any age".

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6. The Government will present evidence the defendant maintains a storage facility in New York which contains downloaded child pornography.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: *s/Douglas Molloy*
DOUGLAS MOLLOY
Assistant United States Attorney
Florida Bar No. 0316716
2110 First Street, Suite 3-137
Fort Myers, Florida 33901
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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Peter Ringsmuth
kc@ringsmuthlaw.com

S/Douglas Molloy
DOUGLAS MOLLOY
Assistant United States Attorney

EFTA00192227

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

vs. 2:S05-cr-34-FtM-29SPC

DONALD J. DEVERSO

Court's Instructions
to the Jury

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions - what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendant guilty of the crimes charged in the Second Superceding Indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendant or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all

of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The Second Superceding Indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. The Government has the burden of proving a Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. It is only required that the Government's proof exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has

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been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you. Also, you should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the

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weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

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The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

A Defendant has a right not to testify. If a Defendant does testify, however, you should decide in the same way as that of any other witness whether you believe the Defendant's testimony.

EFTA00192232

The testimony of some witnesses must be considered with more caution than the testimony of other witnesses.

In this case the Government called as one of its witnesses a person with whom the Government has entered into a plea agreement providing for the possibility of a lesser sentence than the witness would otherwise be exposed to. Such plea bargaining, as it's called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court. However, a witness who hopes to gain more favorable treatment may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider such testimony with more caution than the testimony of other witnesses.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field is permitted to state an opinion concerning those technical matters.

Merely because such a witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it. In this case you have been

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permitted to take notes during the course of the trial, and most of you - perhaps all of you - have taken advantage of that opportunity and have made notes from time to time.

You will have your notes available to you during your deliberations, but you should make use of them only as an aid to your memory. In other words, you should not give your notes any precedence over your independent recollection of the evidence or the lack of evidence; and neither should you be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

Count One of the Second Superceding Indictment charges that the Defendant did knowingly possess one or more matters containing child pornography which had been transported in interstate or foreign commerce, including by computer. Title 18, United States Code, Section 2252(a)(4)(B), makes it a Federal crime or offense for any person to knowingly possess child pornography that has been transported in interstate or foreign commerce, including by computer.

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

First: That the Defendant knowingly possessed matters which the Defendant knew contained a visual depiction of a minor engaged in sexually explicit conduct;

Second: That the Defendant knew the visual depiction contained in the matters was of a minor engaged in sexually explicit conduct;

Third: The Defendant knew that production of such a visual depiction involved use of a minor in sexually explicit conduct; and

Fourth: That the visual depiction had been transported in interstate or foreign commerce.

The term "interstate or foreign commerce" means the movement of property from one state to another state or from one state to another country. The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States. It is not necessary for the Government to prove that the Defendant knew that the alleged child pornography had moved in interstate or foreign commerce, only that it had so moved.

The term "computer" means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such

EFTA00192235

term does not include an automated typewriter or typesetter, a portable hand-held calculator, or other similar device.

The term "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

The term "minor" means any person under the age of eighteen (18) years.

The term "visual depiction" includes data stored on computer disk or by electronic means which is capable of conversion into a visual image.

The term "sexually explicit conduct" means actual or simulated:

(a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; or

(b) lascivious exhibition of the genitals or pubic area of any person.

Regarding the last type of sexually explicit conduct - "lascivious exhibition" - not every exposure of the genitals or pubic area constitutes a lascivious exhibition. In determining whether a visual depiction constitutes a lascivious exhibition, you should consider the context and setting in which the genitalia or

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pubic area is being displayed. You may consider the overall content of the material. You may also consider such factors as whether the focal point of the visual depiction is on the minor's genitalia or pubic area, or whether there is some other focal point. You may consider whether the setting of the depiction is such as to make it appear to be sexually inviting or suggestive; for example, in a location or in a pose associated with sexual activity. In addition you may consider whether the minor appears to be displayed in an unnatural pose or in inappropriate attire. You may also consider whether the minor is partially clothed or nude. You may consider whether the depiction appears to convey sexual coyness or an apparent willingness to engage in sexual activity, and whether the depiction appears to have been designed to elicit a sexual response in the viewer. Of course, a visual depiction need not involve all of these factors to be a lascivious exhibition.

Count Two of the Second Superceding Indictment charges that the Defendant did knowingly transport or ship in interstate and foreign commerce, by any means, including by computer, material involving the sexual exploitation of minors. Title 18, United States Code, Section 2252(a)(1), makes it a Federal crime or offense for any person to knowingly transport or ship any visual depiction in interstate or foreign commerce, by any means including

EFTA00192237

by computer, if the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct.

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

First: That the Defendant knowingly transported or shipped a visual depiction in interstate or foreign commerce by any means, including by computer;

Second: That the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct;

Third: That such visual depiction is of a minor engaged in sexually explicit conduct; and

Fourth: That the Defendant knew that at least one of the performers in such visual depiction was a minor and knew that the visual depiction was of such minor engaged in sexually explicit conduct.

The terms "interstate or foreign commerce," "computer," "sexually explicit conduct," "visual depiction", and "minor" have been defined to you earlier and apply to Count Two.

Count Three of the Second Superceding Indictment charges that the Defendant did knowingly employ, use, persuade, induce, entice, or coerce a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing child pornography material, and did knowingly transport such material to the United States in interstate and foreign commerce by any means, including

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by computer. Title 18, United States Code, Section 2251(c)(2)(b), makes it a Federal crime or offense for any person to knowingly employ, use, persuade, induce, entice or coerce a minor to engage in sexually explicit conduct outside of the United States for the purpose of producing a visual depiction of such conduct, and transport such visual depiction to the United States by any means, including by computer, and which visual depiction had actually been transported in interstate or foreign commerce or mail.

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

First: That the Defendant knowingly employed, used, persuaded, induced, enticed, or coerced a minor to take part in sexually explicit conduct for the purpose of producing a visual depiction of such conduct;

Second: That such visual depiction is of a minor engaged in sexually explicit conduct;

Third: That such production was made outside the United States; and

Fourth: That the Defendant knowingly transported such visual depiction to the United States, its territories or possessions, by any means, including by computer or mail.

The Government need not prove that the Defendant knew that the minor was under 18 years old.

A person "uses" a minor to produce child pornography if the minor serves as the subject of photography. The term "induce" means to stimulate the occurrence of or to cause.

EFTA00192239

The terms "sexually explicit conduct," "visual depiction," and "minor" have been described to you earlier and apply to Count Three.

The term "transportation" simply means to send or carry something from one place to another. Transportation can be accomplished in any of a variety of ways, either directly because a person personally carries an item or indirectly because a person makes use of a third party, such as a commercial shipper or through the use of the mails. The transportation must, however, involve the movement of the materials into the United States.

As I mentioned above, this transportation can be accomplished by any means, including by a computer. Images transmitted or received over the Internet to the United States would constitute transportation to the United States within the meaning of this statute.

The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may also have sole possession or joint possession.

A person who knowingly has direct physical control of something is then in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over

EFTA00192240

something either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, that possession is sole. If two or more persons share possession, such possession is joint.

Whenever the word "possession" has been used in these instructions it includes constructive as well as actual possession, and also joint as well as sole possession.

You will note that the Second Superceding Indictment charges that the offenses were committed "in or about" and "on or about" certain dates. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the Second Superceding Indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

In these charges, the Court has reviewed the pertinent parts of federal law which are alleged to have been violated.

EFTA00192241

Where a statute specifies several alternative ways in which an offense may be committed, the Second Superceding Indictment may allege the several ways in the conjunctive, that is, by using the word "and." However, if only one of the alternatives is proved beyond a reasonable doubt, that is sufficient for conviction, so long as the jury agrees unanimously as to that alternative.

A separate crime or offense is charged in each count of the Second Superceding Indictment. Each charge, and the evidence pertaining to it, should be considered separately. The fact that you may find the Defendant guilty or not guilty as to one of the offenses charged should not affect your verdict as to any other offense charged.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether the Defendant is guilty or not guilty. The Defendant is on trial only for those specific offenses alleged in the Second Superceding Indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If the

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Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will

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preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience.

[Explain verdict]

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the court security officer who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

EFTA00192244

Villafana, Ann Marie C. (USAFLS)

From: King, Damon
Sent: Tuesday, March 04, 2008 4:18 PM
To: Greenberg, Bonnie (USAMD); Blanch, Joey (USACAC); USAEO-PSC-Coordinators
Subject: RE: transportation question

Transportation-aiding and abetting

The courts in the following cases held or recognized that although the term "transport," within the meaning of 18 U.S.C.A. § 2423(a), criminalizing the transportation of a minor across state lines for unlawful sexual purposes, does not extend to causing the transportation of a minor, to support a conviction under 18 U.S.C.A. § 2423(a) under an aiding and abetting theory (18 U.S.C.A. § 2), it is sufficient to prove that the defendant caused the minor to be transported across state lines for unlawful sexual purposes.

In U.S. [redacted] Footman, 215 F.3d 145 (1st Cir. 2000), the court recognized that, although the term "transport," within the meaning of the 18 U.S.C.A. § 2423(a), criminalizing the knowing transport of a minor across state lines for purposes of prostitution, does not extend to "causing" the transportation of a minor, to support a conviction under 18 U.S.C.A. § 2423 under an aiding and abetting theory (18 U.S.C.A. § 2), it is sufficient to prove that the defendant caused the minor to be transported across state lines for an unlawful sexual purpose. Thus, the court found, in a prosecution for transporting a minor across state lines for purposes of prostitution in violation of 18 U.S.C.A. § 2423(a), even if the trial court's instructions defining "knowing transportation" as "causing" the transportation of a minor in interstate commerce for the purpose of transportation was error, such error was harmless, as the definition was proper to support the defendant's conviction as an aider and abettor where the evidence indicated that another prostitute was the defendant's agent in transporting the minor across state lines, the women traveled in the defendant's car and the minor wired money back to the defendant, and the minor testified that she and other prostitutes traveled to another state at the defendant's direction.

In U.S. [redacted] Johnson, 132 F.3d 1279, 48 Fed. R. Evid. Serv. 562 (9th Cir. 1997), a prosecution for transportation of a minor with intent to engage in criminal sexual activity in violation of 42 U.S.C.A. § 2423(a), the court held that the trial judge's jury instructions-that it could find the defendant guilty if the jury determined that he had "transported or caused to be transported a minor from Norway to Fresno"-were not improper where the defendant was charged as an aider and abettor under 18 U.S.C.A. § 2(b). The court said that the defendant could be convicted of transportation of a minor with intent to engage in criminal sexual activity if he "transported or caused to be transported" a minor under the statute pertaining to aiding and abetting, 18 U.S.C.A. § 2(b), permitting a person causing a criminal act to be done by another to be punished as a principal actor. Thus, it was enough that the defendant caused the Norwegian minor's transport and possessed the requisite intent to engage in unlawful sexual conduct even if the entity carrying out the transport-the foreign student exchange program or the minor himself-lacked criminal intent. Further, the court found, the defendant's conviction was supported by evidence that the defendant, immediately after the arrival of the victim, who was a foreign exchange student, progressively introduced discussion and then engagement in sexual acts, as well as evidence of inconsistencies and misrepresentations in the defendant's application to serve as a host parent, expert testimony that the defendant's conduct indicated a sophisticated "grooming" process that did not arise spontaneously, and evidence of the defendant's prior sexual contacts with minors.

See U.S. [redacted] Garrett, 720 F.2d 705 (D.C. Cir. 1983), in which the court held that the defendant's extensive involvement as a go-between in "facilitating" the interstate transportation of a young male to a customer for the purpose of prohibited sexual conduct for commercial exploitation satisfied every element of the offense of aiding and abetting the

EFTA00192245

primary offense of transportation of a minor in interstate commerce for purposes of prohibited sexual conduct for commercial exploitation in violation of 18 U.S.C.A. § 2423. Also, the court held, the defendant's so-called withdrawal from the criminal venture, coming only after the defendant satisfied himself that his active participation was no longer required to assure the success of the venture, namely, the transportation of the minor for the aforesaid criminal purposes, was insufficient to constitute abandonment of the criminal enterprise.

A defendant will be deemed to have "transported" an individual, under Mann Act section prohibiting knowing transportation of any individual in interstate or foreign commerce with intent that such individual engage in prostitution or in criminal sexual activity, where the evidence shows that the defendant personally or through an agent performed the proscribed act of transporting, as opposed to situations where the victim travels under her own steam, without need of anyone to transport her. 18 U.S.C.A. § 2421. U.S. [redacted] Holland, 381 F.3d 80 (2d Cir. 2004).

A defendant will be deemed to have "transported" an individual, under Mann Act section prohibiting knowing transportation of any individual in interstate or foreign commerce with intent that such individual engage in prostitution or in criminal sexual activity, where the evidence shows that the defendant personally or through an agent performed the proscribed act of transporting, as opposed to situations where the victim travels under her own steam, without need of anyone to transport her. 18 U.S.C.A. § 2421. U.S. [redacted] Holland, 381 F.3d 80 (2d Cir. 2004).

Sufficient evidence established that codefendant aided and abetted defendant in the interstate transportation of a minor with the intent to commit an aggravated sexual assault; codefendant accompanied defendant to mall where victims were picked up, participated in cruising and smoking marijuana, threatened children to get them to remain in house after state line was crossed, turned up stereo to cover sounds of assault, and celebrated with defendant after the assault. 18 U.S.C.A. §§ 2, 2423. U.S. [redacted] Bonty, 383 F.3d 575 (7th Cir. 2004).

Damon A. King
Deputy Chief
Child Exploitation and Obscenity Section Criminal Division United States Department of Justice 1400 New York Ave. N.W. Suite 6400 Washington, DC 20005
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(f) 202-514-1793

-----Original Message-----
From: Greenberg, Bonnie (USAMD) [mailto:Bonnie.Greenberg@usdoj.gov]
Sent: Saturday, March 01, 2008 8:28 PM
To: Blanch, Joey (USACAC); USAEO-PSC-Coordinators
Subject: RE: transportation question

I would feel comfortable charging it. And you can add in 18 USC Section 2 (aiding and abetting) just to be safe

Sent by Good Messaging (www.good.com)

-----Original Message-----
From: Blanch, Joey (USACAC)
Sent: Friday, February 29, 2008 09:49 PM Eastern Standard Time
To: USAEO-PSC-Coordinators
Subject: transportation question

EFTA00192246

We have a guy here who molested a neighbor boy almost every day for 2-3 years. The boy's family moved. In 2006 and again in 2007, the boy travelled from another state to Los Angeles to visit the defendant, and was again molested on each trip.

I would like to charge defendant with 2423(a) - transportation of a minor with intent to engage in criminal sexual activity. However, I cannot prove that the defendant PAID for the boy's trip, or arranged the travel. Do you think it is sufficient if I can prove that the guy caused the travel, by speaking to the victim's parents and encouraging/suggesting that the boy come and visit him, and facilitated the travel by picking the boy up at the airport, allowing the boy to stay at his home, etc - all with the intention that he would molest the boy once the boy arrived?

EFTA00192247

Villafana, Ann Marie C. (USAFLS)

From: Senior, Robert (USAFLS)
Sent: Wednesday, March 12, 2008 10:23 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Another victim issue

If any man is approaching her in an unwanted fashion and won't relent, I would suggest that she call campus security. I'm not sure that a school is a "public place" to the extent that anybody can come on campus and hassle students. I'm sure they wouldn't let unauthorized vendors come on campus so why would they let a grown man repeatedly harass one of their students. It would help if she has the name and the number of the investigator. Campus security would then be wise to warn him to not send a surrogate to hassle, i.e. aid and abet the continued harassment. Just a thought that may be worth exploring.

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 8:20 AM
To: Senior, Robert (USAFLS)
Subject: Another victim issue

Hi Bob – Apparently one of Epstein's investigators is following one of our victims around her campus. She keeps telling him that she doesn't want to talk and he continues to approach her. In addition to the direct contact, she feels intimidated that he is approaching other people on campus and that others will find out about her involvement with JE. This is the same victim who called us about Jeff Herman. Is there anything that we can do?

A. Marie Villafaña
Assistant U.S. Attorney
500 S. Australian Ave, Suite 400
West Palm Beach, FL 33401
Phone 561 209-1047
Fax 561 820-8777

EFTA00192248

Villafana, Ann Marie C. (USAFLS)

From: Greenberg, Bonnie (USAMD)
Sent: Wednesday, March 12, 2008 10:15 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

Could you let me know if you get any info? I have a similar situation---an adult victim who was photographed when she was a child. She wants an attorney before she talks to us.

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 8:27 AM
To: USAEO-PSC-Coordinators
Subject: Appointment of counsel for victims?

Good morning, everyone. Sorry to bother.

I am investigating a child exploitation case with a large number of victims. They were teenagers when they were victims and many are now over the age of 18. Investigators for the defense are following them around, showing up on campus, and making visits to their parents' homes. (Many victims' parents do not know about the conduct under investigation.) The victims have told the investigators that they do not want to talk, but they continue to be harassed. The case has not yet been indicted, so I can't simply ask the assigned district judge to rein in the defense.

Does anyone have any experience or advice on getting counsel appointed for such victims? The guardian ad litem statute seems to be limited to victims who are currently minors and the material witness statute seems to be limited to situations where there is a strong possibility of flight.

Any help and samples would be greatly appreciated. Thank you all.

A. Marie Villafaña
Assistant U.S. Attorney
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Phone 561 209-1047
Fax 561 820-8777

EFTA00192249

Villafana, Ann Marie C. (USAFLS)

From: Braden, Myesha
Sent: Wednesday, March 12, 2008 10:01 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: Re: Appointment of counsel for victims?

Is there an anti-trafficking NGO nearby? If they have attorneys on staff, they are usually willing to provide pro bono counsel. The only trick is to make sure that they don't interfere with the prosecution. Another option may be a domestic violence NGO.

Sent from my BlackBerry Wireless Device

----- Original Message -----
From: Villafana, Ann Marie C. (USAFLS) <Ann.Marie.C.Villafana@usdoj.gov>
To: USAEO-PSC-Coordinators <USAEO-PSC-Coordinators@usa.doj.gov>
Sent: Wed Mar 12 08:27:02 2008
Subject: Appointment of counsel for victims?

Good morning, everyone. Sorry to bother.

I am investigating a child exploitation case with a large number of victims. They were teenagers when they were victims and many are now over the age of 18. Investigators for the defense are following them around, showing up on campus, and making visits to their parents' homes. (Many victims' parents do not know about the conduct under investigation.) The victims have told the investigators that they do not want to talk, but they continue to be harassed. The case has not yet been indicted, so I can't simply ask the assigned district judge to rein in the defense.

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Any help and samples would be greatly appreciated. Thank you all.

A. Marie Villafaña

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

Phone 561 209-1047

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EFTA00192250

Villafana, Ann Marie C. (USAFLS)

From: Gelber, [redacted]
Sent: Wednesday, March 12, 2008 9:53 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: Re: Appointment of counsel for victims?

Having said that, I recently had a case involving 16 victims where we got an order of protection to call off defense investigators. I will send you the motion so you have it in your back pocket.

----- Original Message -----
From: Villafana, Ann Marie C. (USAFLS) <Ann.Marie.C.Villafana@usdoj.gov>
To: USAEO-PSC-Coordinators <USAEO-PSC-Coordinators@usa.doj.gov>
Sent: Wed Mar 12 08:27:02 2008
Subject: Appointment of counsel for victims?

Good morning, everyone. Sorry to bother.

I am investigating a child exploitation case with a large number of victims. They were teenagers when they were victims and many are now over the age of 18. Investigators for the defense are following them around, showing up on campus, and making visits to their parents' homes. (Many victims' parents do not know about the conduct under investigation.) The victims have told the investigators that they do not want to talk, but they continue to be harassed. The case has not yet been indicted, so I can't simply ask the assigned district judge to rein in the defense.

Does anyone have any experience or advice on getting counsel appointed for such victims? The guardian ad litem statute seems to be limited to victims who are currently minors and the material witness statute seems to be limited to situations where there is a strong possibility of flight.

Any help and samples would be greatly appreciated. Thank you all.

A. Marie Villafaña

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

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EFTA00192251

Villafana, Ann Marie C. (USAFLS)

From: Patel, Krishna (USACT)
Sent: Wednesday, March 12, 2008 9:42 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

I believe so but we are permitted to appoint CJA to any potential witnesses. The way I normally do it is to subpoena my witnesses to the grand jury. Obviously anyone subpoenaed to the grand jury has a right to have an attorney. After talking to them, I let the court know that they want an attorney. I have had no problems at all. I am staring 1591 sex trafficking case on Monday involving many minors, some of which I have had CJA counsel appointed. In light of real witness tampering concerns I also had a protective order entered which required the defense counsel to inform us of the name of the investigator and then our FBI agent was permitted to call the witnesses to let them know only this individual could contact them and they were free to talk to the investigator or not.

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 9:05 AM
To: Patel, Krishna (USACT)
Subject: RE: Appointment of counsel for victims?

I know about the guardian ad litem provision but it is specifically limited to victims who are currently minors. Have you ever done this for a minor-victim who is now an adult? Would you mind sending a sample? Thank you!

A. Marie Villafaña
Assistant U.S. Attorney
500 S. Australian Ave, Suite 400
West Palm Beach, FL 33401
Phone 561 209-1047
Fax 561 820-8777

From: Patel, Krishna (USACT)
Sent: Wednesday, March 12, 2008 9:02 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

I routinely get CJA counsel appointed for victims. I don't know how it is done in your district but we talk to the victims about whether they want counsel and then write a letter (especially if they are minors or in their late teens). There is a provision in the criminal code for appointing a guardian ad litem.

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 8:27 AM
To: USAEO-PSC-Coordinators
Subject: Appointment of counsel for victims?

Good morning, everyone. Sorry to bother.

EFTA00192252

I am investigating a child exploitation case with a large number of victims. They were teenagers when they were victims and many are now over the age of 18. Investigators for the defense are following them around, showing up on campus, and making visits to their parents' homes. (Many victims' parents do not know about the conduct under investigation.) The victims have told the investigators that they do not want to talk, but they continue to be harassed. The case has not yet been indicted, so I can't simply ask the assigned district judge to rein in the defense.

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Any help and samples would be greatly appreciated. Thank you all.

A. Marie Villafaña
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EFTA00192253

Villafana, Ann Marie C. (USAFLS)

From: Brown, Rodney (USAFLM)
Sent: Wednesday, March 12, 2008 9:26 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: FW: Appointment of counsel for victims?

From: Brown, Rodney (USAFLM)
Sent: Wednesday, March 12, 2008 9:23 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

Good morning. Two thoughts. First, can you approach your local Legal Aid clinic for some *pro bono* attorneys? I bet that some young associates from big firms would love to get out of the library and do some real justice. Second, consider sending the defense counsel a letter identifying the victims that do not wish to be interviewed and reminding counsel about 18 U.S.C. Section 1512(b). That may be a deterrent.

D. Rodney Brown
Assistant United States Attorney
Middle District of Florida
Jacksonville Division

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 8:27 AM
To: USAEO-PSC-Coordinators
Subject: Appointment of counsel for victims?

Good morning, everyone. Sorry to bother.

I am investigating a child exploitation case with a large number of victims. They were teenagers when they were victims and many are now over the age of 18. Investigators for the defense are following them around, showing up on campus, and making visits to their parents' homes. (Many victims' parents do not know about the conduct under investigation.) The victims have told the investigators that they do not want to talk, but they continue to be harassed. The case has not yet been indicted, so I can't simply ask the assigned district judge to rein in the defense.

Does anyone have any experience or advice on getting counsel appointed for such victims? The guardian ad litem statute seems to be limited to victims who are currently minors and the material witness statute seems to be limited to situations where there is a strong possibility of flight.

Any help and samples would be greatly appreciated. Thank you all.

A. Marie Villafaña
Assistant U.S. Attorney
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EFTA00192254

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EFTA00192255

Villafana, Ann Marie C. (USAFLS)

From: Brown, Rodney (USAFLM)
Sent: Wednesday, March 12, 2008 9:23 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

Good morning. Two thoughts. First, can you approach your local Legal Aid clinic for some *pro bono* attorneys? I bet that some young associates from big firms would love to get out of the library and do some real justice. Second, consider sending the defense counsel a letter identifying the victims that do not wish to be interviewed and reminding counsel about 18 U.S.C.

D. Rodney Brown
Assistant United States Attorney
Middle District of Florida
Jacksonville Division

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 8:27 AM
To: USAEO-PSC-Coordinators
Subject: Appointment of counsel for victims?

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EFTA00192256

Villafana, Ann Marie C. (USAFLS)

From: Gelber, [redacted]
Sent: Wednesday, March 12, 2008 9:23 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: Re: Appointment of counsel for victims?

Nothing is preventing the women from getting an attorney on their own and/or seeking a restraining order even without an attorney. A law school clinic or legal aid should be able to help them. In the long run, it is better for your case if they take these steps on their own with minimal involvement from the prosecution.

----- Original Message -----
From: Villafana, Ann Marie C. (USAFLS) <Ann.Marie.C.Villafana@usdoj.gov>
To: USAEO-PSC-Coordinators <USAEO-PSC-Coordinators@usa.doj.gov>
Sent: Wed Mar 12 08:27:02 2008
Subject: Appointment of counsel for victims?

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EFTA00192257

Villafana, Ann Marie C. (USAFLS)

From: Peters, Jim (USAID)
Sent: Wednesday, March 12, 2008 10:39 AM
To: Villafana, Ann Marie C. (USAFLS)
Subject: RE: Appointment of counsel for victims?

We have had GAL's appointed pre-indictment. Here are a couple of examples. Neither was over 18, however. If they were minors at the time of the crime, I'd give it a run and see if the court raises the issue.

Young.GuardianOrder.wpd

Young.GALdeclarion.wpd

Duncan.GuardianOrder.wpd

Duncan.GALdeclaration.wpd

Duncan.GALMotion.wpd

From: Villafana, Ann Marie C. (USAFLS)
Sent: Wednesday, March 12, 2008 6:27 AM
To: USAEO-PSC-Coordinators
Subject: Appointment of counsel for victims?

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EFTA00192258

Harold Lee BATSELL, Appellant,

UNITED STATES of America, Appellee (two cases).

Nos. 18945, 19344.

United States Court of Appeals
Eighth Circuit.

Nov. 19, 1968.

Certiorari Denied Feb. 24, 1969.

See 89 S.Ct. 865.

Prosecution for having persuaded, induced, enticed, and caused woman to go from one state to another for immoral purposes. The United States District Court for the District of Minnesota, Earl R. Larson, J., rendered judgment, and defendant appealed. The Court of Appeals, Vogel, Circuit Judge, held that refusal to respond to jury's request for further definition of word "induces", other than to state that words were to be given their common usage, was not error.

Affirmed.

1. Prostitution ⇐1

Word "induces" in second section of Mann Act is one of common usage and meaning and requires no explanation or definition. 18 U.S.C.A. § 2422.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1038(1)

Defendant may not assign as error any inaccuracy in instructions without first having called attention of trial court thereto, thus giving it opportunity of making correction. Fed.Rules Crim.Proc. rule 30, 18 U.S.C.A.

3. Criminal Law ⇐1039

Trial court's failure to respond to jury's request for further definition of word "induces" in Mann Act was not plain error. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.; 18 U.S.C.A. § 2422.

4. Criminal Law ⇐863(2)

Trial court's refusal, in prosecution for having persuaded, induced, enticed and caused woman to go in interstate commerce for immoral purposes, to respond to jury's request for further definition of word "induces", other than to state that words were to be given their common usage, was not error. 18 U.S.C.A. § 2422.

5. Criminal Law ⇐1173(3)

That jury returned verdict of not guilty under first section of Mann Act and guilty under second section did not indicate that jury, which had unsuccessfully requested further definition of words "inducement" or "induces", was confused as to the meaning of these terms in second section. 18 U.S.C.A. §§ 2421, 2422.

6. Prostitution ⇐5

Jury could properly return verdict of not guilty under first section of Mann Act and guilty under second section even though evidence would have justified finding of guilty under both sections. 18 U.S.C.A. §§ 2421, 2422.

7. Prostitution ⇐1

Offenses prescribed by first and second sections of Mann Act are separate and distinct. 18 U.S.C.A. §§ 2421, 2422.

8. Criminal Law ⇐633(1)

In presiding over jury trial, judge must exercise discretion in many ways, including determination of time to be allowed for argument, length of direct and cross-examination, keeping of opening statements within proper bounds, proper conduct of parties, witnesses and counsel, excluding of witnesses, etc.

9. Criminal Law ⇐711

Limiting of counsel to one hour of argument on each side, in case which was neither complex nor protracted, was not abuse of discretion, and defendant was not denied fair trial by limitation, court having in fact allowed defense counsel one hour and 40 minutes.

10. Prostitution ⇐4

Evidence sustained conviction for having persuaded, induced, enticed and caused woman to go from one state to another for immoral purposes. 18 U.S.C.A. § 2422.

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11. Witnesses ⇐283

Trial court's statement when defense counsel, after lengthy cross-examination of prosecution witness, said that he might like to recall witness, that if there were to be more cross-examinations counsel should continue now, whereupon cross-examination was continued and defense counsel concluded with "no further questions", was not improper although witness had been recalled four times by prosecution at earlier trial at which she claimed loss of memory.

12. Criminal Law ⇐942(2)

New trial motion based upon alleged recantation of material witness should be viewed with disfavor. Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A.

13. Criminal Law ⇐942(2), 1156(3)

New trial motions based on alleged recantation of material witness are generally addressed to sound judicial discretion of trial court and there will be no reversal except for clear abuse. Fed. Rules Crim.Proc. rule 33, 18 U.S.C.A.

14. Criminal Law ⇐942(2)

Denial of new trial sought on ground of alleged recantation of material witness who, at hearing on motion, maintained that her testimony at trial had been truthful and testified that recantation had been due to fear and threats, was not abuse of discretion. Fed.Rules Crim.Proc. rule 33, 18 U.S.C.A.

Ellis Olkon, Minneapolis, Minn., for appellant, and Sheldon J. Eviden, Minneapolis, Minn., on the briefs.

J. Earl Cudd, Asst. U. S. Atty., Minneapolis, Minn., for appellee, Patrick J. Foley, U. S. Atty., and Neil P. Convery, Asst. U. S. Atty., Minneapolis, Minn., on the brief.

Before VOGEL, LAY and BRIGHT, Circuit Judges.

VOGEL, Circuit Judge.

We are concerned here with two separate appeals in a criminal conviction. The first appeal is from a judgment of conviction entered against appellant-defendant, Harold Lee Batsell, for violation of Section 2422 of the Mann Act, 18 U.S.C.A. § 2421 et seq. The second appeal is from the District Court's denial of defendant's motion, pursuant to Rule 33, Federal Rules of Criminal Procedure, 18 U.S.C.A., for a new trial on the ground of newly discovered evidence. In each case we affirm.

The issues in the appeal from the judgment of conviction will be considered first. The defendant was indicted in the District of Minnesota under 18 U.S.C.A. § 2421 for having procured interstate transportation for one Gloria Jean Hull (hereinafter "Miss Hull") from Minneapolis, Minnesota to New York City "for the purpose of prostitution, debauchery and other immoral purposes, and with intent on the part of [defendant] to induce, entice, and compel [Miss Hull] to give herself up to the practice of prostitution and debauchery and other immoral practices", and under 18 U.S.C.A. § 2422 for having persuaded, induced, enticed and caused Miss Hull to go from Minneapolis to New York for the aforesaid purposes.[1]

1. The exact wording of the first indictment is:

"The United States Grand Jury charges:

"That on or about the 22nd day of May, 1966, in the District of Minnesota, Fourth Division,

HAROLD LEE BATSELL

did knowingly procure and obtain an airline passenger ticket from Northwest Airlines, Inc., a common carrier in interstate commerce, said airline passenger ticket to be used by Gloria Jean Hull for travel in interstate commerce from Minneapolis-St. Paul International Airport, Wold Chamberlain Field, District of Minnesota, to New York City, State of New York, for the purpose of prostitution, debauchery and other immoral purposes, and with intent on the part of Harold Lee Batsell to induce, entice, and compel the said Gloria Jean Hull to give herself up to the practice of prostitution and debauchery and other immoral practices, whereby the said Gloria Jean

The two indictments were consolidated for trial. What is hereinafter referred to as the first trial was commenced in the United States District Court in Minneapolis, Minnesota, before the Honorable Earl R. Larson and a jury on March 20, 1967. On March 27, 1967, after considerable testimony had been taken, the court granted defendant's motion for a mistrial.

The second trial, also before Judge Larson and a jury, commenced in St. Paul, Minnesota, on June 5, 1967. This trial resulted in defendant's acquittal of the charge under 18 U.S.C.A. § 2421 (the first indictment) and defendant's conviction for violation of 18 U.S.C.A. § 2422 (the second indictment).

The defendant relies generally on three grounds in his appeal from the judgment of conviction:

"I.

"The defendant was denied a fair trial because the jury's confusion as to the word 'inducement' in the statute 18 U.S.C. § 2422 was never clarified even after the jury requested clarification and the confusion was manifest in the inconsistent verdicts returned by the jury.

"II.

"In view of completely contradictory stories told by complaining witness, [the] evidence was insufficient to sustain conviction.

"III.

"Refusal of the court to allow defendant to recall Gloria Jean Hull, the key prosecution witness after the prosecution had been allowed to recall her on four separate occasions, constituted reversible error."

In order to properly resolve defendant's contentions, it is necessary to analyze in some detail the proceedings of the first and second trials.

During the first trial, Miss Hull, the alleged victim of the unlawful act charged against the defendant, suffered a "memory loss" until recalled by the prosecution for the fourth time. Upon being recalled the fourth time, she testified, after stating that her memory had returned, that she made the trip from Minneapolis to New York without inducement, enticement or persuasion by the defendant; that she went to New York to run away from her problems; that she did not know what she would be doing in New York; that although she did have sexual adventures in New York, she did so of her own free accord; that she boarded the airplane in Minneapolis with the defendant; and that defendant purchased her plane ticket. At this point defendant's motion for a mistrial was granted.

The second trial was delayed until Miss Hull, who disappeared after the first trial, could be located by the FBI and confined as a material witness under a $10,000 bond. At this trial, Miss Hull testified that she was 18 years of age at the time of the alleged unlawful acts; that she first met defendant when she was 14 or 15; that she attended a reform school for girls at Sauk Center, Minnesota; that the night before the trip to

Hull was transported in interstate commerce in violation of Title 18 U.S.C. 2421."

The second indictment states:

"The United States Grand Jury charges:

"That on or about the 22nd day of May, 1966, in the District of Minnesota, Fourth Division,

HAROLD LEE BATSELL

did knowingly persuade, induce and entice a woman, that is, Gloria Jean Hull, to go from Minneapolis, County of Hennepin, State and District of Minnesota, to New York City, State of New York, for the purpose of prostitution and debauchery and for other immoral purposes and with the intent and purpose on the part of Harold Lee Batsell that Gloria Jean Hull should engage in the practice of prostitution and debauchery and other immoral practices, and Harold Lee Batsell did thereby knowingly cause Gloria Jean Hull to go and to be carried and transported as a passenger upon the line and route of Northwest Orient Airlines, a common carrier in interstate commerce, in violation of Title 18, United States Code, Section 2422."

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New York she stayed at the defendant's father's home in Minneapolis, although her mother's residence was also in Minneapolis; that she was driven to the airport accompanied by the defendant's sister, the sister's boy friend, and the defendant; that she went to New York voluntarily after having been persuaded by the defendant; that it was "understood" that what she would be doing in New York would be prostitution; that after the defendant "persuaded" her to go to New York, she went voluntarily; that defendant purchased her airplane ticket; and that defendant boarded the plane with her. She further testified that the defendant drove her from the New York airport to the Park Sheraton Hotel, where they met Nancy Ubel (who later became defendant's wife); that defendant then took her to the Taft Hotel, where she registered after receiving $20 from him; that he took her to her first "trick" the next morning; and that he subsequently took her to two or three other "tricks". During her sojourn in New York she continued to earn money as a prostitute, giving most of it to Nancy Ubel and to the defendant. Miss Hull's testimony with reference to the trip from Minneapolis to New York, the fact that the defendant accompanied her on the trip, her activities in New York as a prostitute, and the defendant's acquaintance and relationship with her there is substantially corroborated by the testimony of other witnesses. The defendant himself did not testify.

The record indicates that the case was submitted to the jury in the early afternoon of June 8, 1967. At 4:45 p. m. the jury returned to the courtroom and the following transpired:

"THE COURT: I have this written note from the Foreman of the jury: 'Please reread the final instructions to the jury including a definition of terms, especially inducement and intent; also, the specific four points on each indictment.' This is signed by Mr. Cherrier, your Foreman. Do you want me to read all of the instructions?

"JURY FOREMAN: There seemed to be some confusion on our part especially on the term 'inducement' and also in the instructions on the four points that had to do with each indictment. This is what we got hung up on.

"THE COURT: I didn't give you any definition in my instructions of inducement or persuasion or enticement, which are the terms that are used in the instructions. I didn't give you any definitions of those terms because I assumed that these are terms in common usage. On the matter of 'intent,' I did give you three instructions which might have some application on each of the two indictments. I listed the essential elements, which are four in number. Do you want me to reread all of the instructions? Do you want me to reread the instructions as they go to the matter of 'intent' and also the essential elements for each indictment?

"JURY FOREMAN: I think so."

After reiterating the essential elements for the § 2421 indictment, the court stated:

"With respect to Title 18, U.S.C., Section 2422, I instructed you as follows:

"The essential elements required to be proved in order to establish the offense charged under Title 18, Section 2422, are these:

"1. The act of inducing, enticing or persuading a woman or girl, in this case Gloria Jean Hull, to travel in interstate commerce.

"2. Doing such act with the intent or purpose that the woman or girl would engage in prostitution or other immoral practices.

"3. Causing the interstate transportation of a woman or girl, in this case Gloria Jean Hull, by common carrier for the immoral purpose.

"4. Doing such act or acts knowingly and wilfully.

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"The burden is on the prosecution to prove all of the essential elements beyond a reasonable doubt.

"(I will reread these four essential elements.)

"(The four essential elements were reread.)

* * * * * *

"JURY FOREMAN: One other point that you brought out earlier had to do with a person going on a common carrier with or without—I believe it was wilfully inducing—for the purpose of inducing an illegal act. I believe that was one of the four points on the intent.

"THE COURT: You are talking about these four points in the essential elements?

"JURY FOREMAN: Yes.

"THE COURT: I will reread the essential elements in 2421.

* * * * * *

"The other section, Section 2422, the four elements are:

"1. The act of inducing, enticing or persuading a woman or girl, in this case Gloria Jean Hull, to travel in interstate commerce.

"2. Doing such act with the intent or purpose that the woman or girl would engage in prostitution or other immoral practice.

"3. Causing the interstate transportation of the woman or girl by common carrier for the immoral purpose.

"4. Doing such act or acts knowingly and wilfully.

"Perhaps this might be sufficient for your purposes now."

The jurors thereafter appeared satisfied with the court's explanation and defendant's counsel took no exception and made no request. On the following day, June 9, 1967, the jurors returned their verdict of not guilty as to § 2421 and guilty as to § 2422. Upon defendant's request, the jurors were polled. Each answered in the affirmative as to the two verdicts.

As noted, defendant contends on appeal that he was denied a fair trial because the jury's alleged confusion as to the meaning of the word "inducement" in § 2422 "was never clarified even after the jury requested clarification * * *." In response to the jurors' written request, the trial court did not substitute or use a synonym for the term "inducement" as used in the instruction or the words "induce" or "induces" as used in the statutes. Instead the court made it perfectly clear that the words "inducement", "persuasion" and "enticement" were to be given their common usage and had not acquired a special legal meaning. The jurors, and defendant's counsel, appeared satisfied with such explanation. Furthermore, the court carefully and meticulously set out the elements of the offenses under §§ 2421 and 2422.

[1–4] The word "induces" in § 2422 is one of common usage and meaning and requires no explanation or definition. In the first Mann Act case before the Supreme Court, Caminetti v. United States, 1917, 242 U.S. 470, at 485–486, 37 S.Ct. 192, at 194, 61 L.Ed. 442, the court stated:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. [Citations omitted.]
>
> "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. Hamilton v. Rathbone, 175 U.S. 414, 421 [20 S.Ct. 155, 44 L.Ed. 219]. *There is no ambiguity in the terms of this act.* It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and pur-

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pose to *induce* any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them. * * *" (Emphasis supplied.)

This court said through Judge Gardner in Terminal R. Ass'n of St. Louis [redacted] Howell, 8 Cir., 1948, 165 F.2d 135, 140:

"It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based."

Furthermore, we said in Williams [redacted] United States, 8 Cir., 1964, 328 F.2d 256, 262, cert. denied, 1964, 377 U.S. 969, 84 S.Ct. 1651, 12 L.Ed.2d 739:

"A court may and generally should, where the law governing a case is expressed in a statute, employ the language of the statute in its instructions. Terminal R. Ass'n of St. Louis [redacted] Howell, 8 Cir., 165 F.2d 135, 140; Maynard [redacted] United States, 94 U.S.App. D.C. 347, 215 F.2d 336, 339. Except where the statute is complex or not expressed in ordinary language—which is not the situation here—any amplification which a party may desire to have made must be the subject of a requested instruction by him."

See, also, Caldwell [redacted] United States, 8 Cir., 1964, 338 F.2d 385, 391, cert. denied, 1964, 380 U.S. 984, 85 S.Ct. 1354, 14 L.Ed.2d 277. In addition, Rule 30, Federal Rules of Criminal Procedure, 18 U.S.C.A., precludes the assignment as error of any inaccuracy in the instructions without first having called the attention of the trial court thereto, thus giving it the opportunity of making correction. No objection or exception was taken here and most certainly this is not a plain error situation under Rule 52(b). Singer [redacted] United States, 1965, 380 U.S. 24, 38, 85 S.Ct. 783, 13 L.Ed.2d 630; Jones v. United States, 8 Cir., 1968, 396 F.2d 66, 67–68; Rimerman [redacted] United States, 8 Cir., 1967, 374 F.2d 251, 255, cert. denied, 1967, 387 U.S. 931, 87 S.Ct. 2053, 18 L.Ed.2d 992; Aggers [redacted] United States, 8 Cir., 1966, 366 F.2d 744, 748, cert. denied, Coates [redacted] United States, 1967, 385 U.S. 1010, 87 S.Ct. 719, 17 L.Ed.2d 548. We find no error, plain or otherwise, in the court's failure to further elucidate the meaning of the words "inducement" or "induces".

[5–7] The defendant contends that the fact that the jury returned a verdict of not guilty under § 2421 and guilty under § 2422 indicates its confusion as to the meaning of "inducement" or "induces". We do not agree. It was entirely within the province of the jury to find as it did. Even though it must be conceded that the evidence offered by the government would fully have justified a jury finding of guilty under both § 2421 and § 2422, the offenses proscribed by these sections are separate and distinct. LaPage [redacted] United States, 8 Cir., 1945, 146 F.2d 536, 537, 156 A.L.R. 965. Even if it could be said that the verdicts were inconsistent, this court has held that the inconsistency of verdicts upon separate counts of an indictment does not entitle the defendant to a reversal of the judgment upon the counts for which he was convicted. Jones [redacted] United States, 8 Cir., 1968, 396 F.2d 66, 67–68; Aggers [redacted] United States, 8 Cir., 1966, 366 F.2d 744, 748, cert. denied, Coates [redacted] United States, 1967, 385 U.S. 1010, 87 S.Ct. 719, 17 L.Ed.2d 548.

Under the defendant's general assertion that he was denied a fair trial is the claim that the time for defense counsel's summation was unreasonably limited by the trial court. After both sides had rested and the attorneys were about to commence their arguments to the jury, the court suggested that counsel should limit themselves to not more than one hour on a side. After defense counsel had argued for more than an hour, he was interrupted by the court and his attention called to the matter of time. He was, however, granted another thirty minutes. In all, defendant's counsel

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used one hour and forty minutes for his argument.

[8, 9] In presiding over a jury trial, a judge is required to exercise his discretion in many ways, including the determination of the time to be allowed for argument to the jury on each side, the length of direct and cross-examination of witnesses, the keeping of opening statements within proper bounds, the proper conduct of parties, witnesses and counsel, the excluding of witnesses from the courtroom during the examination of other witnesses, etc. This case was neither complex nor protracted in extent. Defense counsel succeeded in obtaining one hour and forty minutes for his summation, despite the court's previous suggestion that each side limit itself to one hour. At the close of defense counsel's argument, he made no complaint to the court and at no time did he point out any issues or facts which he had not had time to discuss with the jury. At no time did counsel object to the original one-hour limitation given by the trial court. Judge Matthes, speaking for this court, said in Butler [redacted] United States, 8 Cir., 1963, 317 F.2d 249, 257, 6 A.L.R.3d 582, 594:

> "It is axiomatic that the limitation of time for arguments of counsel is within the sound discretion of the trial judge.
>
> * * * * * *
>
> "A reversal may be required where counsel is restricted within unreasonable bounds so that he is unable to fully and fairly present his case."

See, also, United States [redacted] Mills, 6 Cir., 1966, 366 F.2d 512; United States [redacted] Roviaro, 7 Cir., 1967, 379 F.2d 911; Barnard [redacted] United States, 9 Cir., 1965, 342 F.2d 309, cert. denied, 1965, 382 U.S. 948, 86 S.Ct. 403, 15 L.Ed.2d 356, rehearing denied, 1966, 382 U.S. 1002, 86 S.Ct. 567, 15 L.Ed.2d 491. Here, the limiting of counsel to one hour of argument on each side was not, in our opinion, an abuse of discretion. In granting additional time thereafter, the court exercised substantial liberality with defense counsel, who claimed to be inexperienced and trying his first felony case in federal court. We find no error.

[10] Appellant's next contention is that the evidence was insufficient to sustain conviction because of the contradictory stories told by Miss Hull, the prosecution's main witness. The conflict between Miss Hull's testimony at the first and second trials was substantially and repetitiously brought to the jurors' attention during her extensive cross-examination. It was the function of the jury to evaluate this testimony and separate fact from fiction. Evidence is not necessarily insufficient merely because a witness' testimony has been contradictory and the explanations therefor difficult of belief. We also note that Miss Hull's testimony concerning defendant's persuasion of her to travel from Minneapolis to New York City accompanied by the defendant and for the purposes of prostitution is substantially corroborated by other testimony. We find no insufficiency here.

Defendant's last claim of error in his appeal from the judgment of conviction is that the trial court refused to allow him to recall Miss Hull after the prosecution had been allowed to recall her on four separate occasions during the first trial. Be that as it may, Miss Hull was called by the prosecution but once during the second trial, which is the trial which resulted in defendant's conviction and with which we are here concerned. Miss Hull's alleged loss of memory during the first trial and her inconsistent statements were well gone over in cross-examination; an examination of the transcript reveals that 38 pages thereof were utilized by government counsel in direct examination of Miss Hull, whereas defense counsel's cross-examination extends over 78 pages. As defense counsel approached the termination of his cross-examination, the following colloquy occurred:

> "Q [By Mr. Olkon] What I am concerned with, Gloria, is when you are telling the truth. Are you telling the truth now?
>
> "A Yes, I am telling the truth now.

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"Q Are you certain that tomorrow you will not have a new story?

"A I am certain I will not have a new story.

"Q Then why for a day and one-half did you tell the Honorable Court and the ladies and gentlemen of the jury that you couldn't remember anything—a simple fact of whether you ever boarded a plane?

"A I told you that answer a million times already.

"THE COURT: This is repetitious, Mr. Olkon.

"MR. OLKON: No further questions.

"MR. CONVERY: No further questions.

"THE COURT: You may be excused, Miss Hull.

"MR. OLKON: Your Honor, I would like to possibly recall her.

"THE COURT: The direct examination was one hour and eight minutes and you have had one hour and 45 minutes of cross-examination. If there is more cross-examination you will continue it right now.

"MR. OLKON: Okay, there is more cross-examination."

Cross-examination then continued for three more pages, after which defense counsel said, "No further questions."

[11] We find no abuse of discretion upon the part of the trial court. An examination of the entire record indicates complete fairness by the court in all rulings and in granting defendant's requests. The trial court did not limit the cross-examination of Miss Hull, but directed only that if there was to be further cross-examination, it was to be completed at that time. As noted, after defense counsel continued with cross-examination for some time, he ended with the statement, "No further questions."

A thorough examination of the entire record convinces us that defendant had a fair trial and that no error was committed.

We turn now to defendant's appeal from the District Court's denial of defendant's motion, pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial on the ground of newly discovered evidence. While defendant's appeal from his judgment of conviction was pending in this court, he filed the above motion on the basis that Miss Hull, on March 6, 1968, had repudiated her testimony and claimed that the defendant did not induce, persuade or entice her to go from Minneapolis to New York in violation of the Mann Act. This court then stayed disposition of the appeal and directed that the District Court consider the motion for new trial. On April 17, 1968, the District Court held a hearing at which Miss Hull (then Mrs. Harpole) testified. She maintained that her testimony at the second trial was the truth. In denying the motion for a new trial on the grounds of newly discovered evidence, the trial court stated:

"On April 17, 1968, Mrs. Harpole [Miss Hull] testified that before March 6, 1968, she had knowledge of a threat from a younger brother of a friend of defendant that if the defendant was convicted she would be killed. She testified also that on or about March 6 that she was afraid of her safety and the safety of her family. It should be noted here that during the first trial the victim's mother had been assaulted by persons considered by the mother to be friends of the defendant.

"Again, it has to be emphasized that the victim testified on April 17, 1968, that she told the truth at the second trial. She has not, therefore, recanted her testimony. The threats the victim describes to her person are real. The threats or coercion defendant's counsel describes are in his mind as indicated in the March 6, 1968, transcript and his questions. The affidavits of the F.B.I. agents refute any claim of threats or coercion. * * *"

[12, 13] The trial court denied the motion, pointing out that motions for new trial on the grounds of newly dis-

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covered evidence based upon recantation of a material witness should be viewed with disfavor and that the five elements necessary to the granting of a motion for a new trial on the ground of newly discovered evidence were lacking herein. We agree with Judge Larson that motions based upon the alleged recantation of a material witness should be viewed with disfavor. We also find that such motions are generally addressed to the sound judicial discretion of the trial court and that there will be no reversal on appeal except for a clear abuse of that discretion. United States v. Johnson, 1946, 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562; Connelly v. United States, 8 Cir., 1959, 271 F.2d 333, cert. denied, Caudle v. United States, 1958, 356 U.S. 921, 78 S.Ct. 700, 2 L.Ed.2d 716, rehearing denied, 1958, 356 U.S. 964, 78 S.Ct. 991, 2 L.Ed.2d 1072.

[14] In McCroskey v. United States, 8 Cir., 1965, 339 F.2d 895, 897, we stated:

> "Thirty-five years ago, this court, in Johnson v. United States, 32 F.2d 127, 130 (8 Cir. 1929), listed five requirements generally recognized for the granting of a new trial for newly discovered evidence: the evidence must in fact be newly discovered since the trial; facts must be alleged from which the court may infer diligence; the evidence must not be merely cumulative or impeaching; it must be material; and it must be such that, on a new trial, it 'would probably produce an acquittal'. We have repeatedly recognized these in recent cases. Ferina v. United States, supra, p. 107 of 302 F.2d [95]; Connelly v. United States, supra, p. 335 of 271 F.2d [333]; Edgar v. Finley, supra, p. 537 of 312 F.2d [533]."

The guide lines for passing on a motion for a new trial on the ground of newly discovered evidence as set forth in *Johnson* have been consistently applied by this court since. See, also, Anderson v. United States, 8 Cir., 1966, 369 F.2d 11, 19, cert. denied, 1967, 386 U.S. 976, 87 S.Ct. 1171, 18 L.Ed.2d 136; Edwards v. United States, 8 Cir., 1966, 361 F.2d 732, 734. The District Court in this case found that these elements were lacking. We are in complete accord. There was no abuse of discretion in the denial of defendant's motion.

These cases are in all things affirmed.

Nathan FLEISCHER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Nos. 219-220, Dockets 31638-31639.

United States Court of Appeals
Second Circuit.

Argued April 9, 1968.

Decided Oct. 31, 1968.

Proceedings on petition for review of decision and order of Tax Court that taxpayer's deductions for educational expenditures were not permissible. The Court of Appeals, Waterman, Circuit Judge, held that evidence sustained findings that taxpayer, who was employed as an entertainer to provide hotel guests with hypnotic demonstrations and lectures, did not undertake his work towards a doctorate in psychology primarily to maintain or to improve skills required by his employment or to meet express requirements of his employer and that his educational expenditures were not deductible.

Affirmed.

1. Internal Revenue ⇐566.1

Purpose of regulations pertaining to deductions of expenses for education is to differentiate between expenditures for education which constitute ordinary and necessary expenses paid or incurred in

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like the state courts of California where certain discretion lies with the trial court judge to strike "priors," or find them proved or not proved, this discretion does not exist under the law the Congress has seen fit to enact for the guidance of federal court judges. We can debate the merits of the matter, but we cannot legislate. No cases are cited by appellant on this point, and we find no merit in it.

The judgment of conviction is affirmed.

Catherine Louise HARMS and Ruth Twisdale Cousins, Appellants,

v.

UNITED STATES of America, Appellee.

No. 7943.

United States Court of Appeals Fourth Circuit.

Argued Oct. 7, 1959.

Decided Nov. 20, 1959.

Prosecutions for violations of White Slave Traffic Act. The United States District Court for the Eastern District of Virginia, at Norfolk, Walter E. Hoffman, J., entered judgment of conviction as to one defendant on three counts and judgment of conviction as to the other defendant on one count and they appealed. The Court of Appeals, Field, District Judge, held that evidence was sufficient to sustain conviction of one defendant on count of inducing a woman to go from one place to another in interstate commerce for purpose of prostitution, but that evidence was insufficient to sustain a conviction of defendants with respect to an alleged conspiracy to commit offenses in violation of White Slave Traffic Act.

Affirmed in part, reversed in part and remanded.

1. Prostitution ⇐4

Evidence was sufficient to sustain conviction of a defendant for violation of statute prohibiting the inducing of a woman to go from one place to another in interstate commerce for purpose of prostitution. 18 U.S.C.A. § 2422.

2. Prostitution ⇐4

Fact that woman had previously expressed to operator of a house of prostitution her desire to return to such house or fact that such person paid her own fare in traveling in interstate commerce by common carrier to return to house after operator thereof had phoned and requested her to come back was immaterial, in view of other evidence, with respect to prosecution of operator for knowingly inducing a woman to go from one place to another in interstate commerce for purpose of prostitution. 18 U.S.C.A. § 2422.

3. Prostitution ⇐4

Where person operating a house of prostitution made a phone call to a woman she had previously known to induce such woman to return to work for operator, it was not essential that government, in prosecuting operator for violation of White Slave Traffic Act, show that operator directed or knew that other woman would travel by interstate commerce, and having shown the knowing inducement or persuasion of woman to come from one state to another and her resultant trip by interstate carrier, government covered essential elements necessary to justify conviction of operator for knowingly inducing a woman to go from one place to another in interstate commerce for purpose of prostitution. 18 U.S.C.A. § 2422.

4. Prostitution ⇐1

Under statute making it a criminal offense for any person knowingly to induce or coerce any woman or girl to go from one place to another in interstate commerce for purpose of prostitution, requisite inducement is any offer sufficient to cause woman to respond. 18 U.S.C.A. § 2422.

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5. Prostitution ⇐4

Evidence was insufficient to sustain conviction of operator of house of prostitution for violation of White Slave Traffic Act where operator, not knowing either of the women involved prior to their time of arrival, agreed to allow such women to come to work at operator's house after such women had telephoned operator who was not shown to have known that call came from out of state. 18 U.S.C.A. § 2422.

6. Prostitution ⇐1

Under statute making it criminal offense for anybody knowingly to persuade, induce, entice or coerce any woman to go from one place to another in interstate commerce for purpose of prostitution, gravamen of offense is the inducement or persuasion to travel in interstate commerce for immoral purposes, since the immoral acts or pursuits in themselves are exclusively the subject of regulation under police power of state where they are committed, and statute makes intent to transport women in interstate commerce for such immoral purposes an element of the crime, and government must present evidence showing intent of defendant in regard to interstate aspect of offense and this intent must necessarily exist prior to or concurrent with the interstate trip of victim. 18 U.S.C.A. § 2422.

7. Conspiracy ⇐47

Evidence was insufficient to sustain conviction of defendants, who were sisters, for conspiracy to violate White Slave Traffic Act. 18 U.S.C.A. §§ 371, 2422.

8. Conspiracy ⇐47

Proof of overt acts in themselves is not sufficient to prove a conspiracy for it must be established that a conspiracy or agreement, which is charged to have existed and which is the gist of the offense, had been formed before and was existing at the time of the commission of the overt act or acts.

9. Conspiracy ⇐47

While agreement of conspiracy may be established by circumstantial evidence, and even though it is not necessary that such circumstantial evidence exclude every reasonable hypothesis consistent with innocence, evidence should be sufficient to prove this element of crime beyond a reasonable doubt.

10. Conspiracy ⇐24

A party cannot conspire with himself.

11. Criminal Law ⇐1177

Where trial court found defendant guilty on three counts and imposed a general sentence and fine jointly upon the counts, and on appeal it was found that defendant was improperly convicted on two of the counts but the penalty imposed on her did not exceed that which might have been imposed on the one remaining count had it stood alone, conviction of defendant must be affirmed.

Robert G. Doumar and Frederick T. Stant, Norfolk, Va., for appellants.

John M. Hollis, U. S. Atty., Norfolk, Va., for appellee.

Before HAYNSWORTH and BOREMAN, Circuit Judges, and FIELD, District Judge.

FIELD, District Judge.

Appellants, Harms and Cousins, who are sisters, along with one, Connie Jean Day, were named as defendants in a five count indictment charging violations of the White Slave Traffic Act. Harms was charged in each of the first four counts with substantive offenses, the first count charging her with violation of 18 U.S.C. § 2423, involving a minor female, Sandra Lee Ulrich. The second count charged her with a violation of 18 U.S.C. § 2422, alleging the inducement of Josephine Bruno. The third and fourth counts charged similar violations of 18 U.S.C. § 2422, involving Linda Fay Pond[redacted] a woman named therein as Ann [redacted], respectively.

The fifth count which named Cousins and Day, along with Harms, as defendants, charged a conspiracy under 18 U.S.

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C. § 371 to commit offenses in violation of the sections above referred to covering the period from November, 1955, to the date of the indictment.

At the trial, the Court acquitted the defendant Harms on the first count of the indictment upon the motion of the Government. At the conclusion of the Government's evidence, the Court granted defendant's motion for judgment of acquittal as to the fourth count as well as the motion for acquittal of the third defendant, Connie Jean Day, on the fifth count.

The jury returned a verdict of guilty on the second, third and fifth counts as to the defendant, Harms, and a verdict of guilty on the fifth count as to the defendant, Cousins. The Court denied appellant's motion to set aside the verdict and entered judgment of conviction of both defendants from which they have appealed.

With reference to the conviction of the appellant Harms on the second count, it is contended that there was not sufficient evidence to show that Harms knowingly exercised the requisite persuasion or inducement of Bruno to travel in interstate commerce. It is further contended that it was essential that the Government show that Harms either directed or knew that the victim, Bruno, would travel by common carrier. The evidence indicated that Bruno and Harms had become acquainted in 1955 and from that time up until January, 1957, Bruno had worked as a prostitute for Harms in Norfolk on several occasions. In November, 1956, Bruno left Norfolk to return to New Jersey with the understanding that she might return to Norfolk to resume her work there in January. On January 2 or 3, 1957, Harms made a telephone call to Bruno in Atlantic City, New Jersey, asking her to return to Norfolk and it was agreed that Bruno would come to Norfolk on January 7, 1957. On that date, Bruno traveled to Norfolk by interstate air line carrier, and, after her arrival, engaged in acts of prostitution in establishments maintained by Harms.

[1, 2] Under this evidence, we feel that the conviction of Harms on the second count unquestionably should be affirmed. The evidence set out above of the telephone invitation from Harms to Bruno and her response in making the interstate trip was sufficient to sustain the jury's finding that Harms effectually induced or persuaded Bruno to make the trip. McGuire v. United States, 8 Cir., 152 F.2d 577; La Page v. United States, 8 Cir., 146 F.2d 536, 156 A.L.R. 965. The fact that Bruno had previously expressed the desire to return to Norfolk or that she paid her own fare, is immaterial in view of the other evidence and the jury's finding thereon. United States [redacted] Reed, 2 Cir., 96 F.2d 785.

[3] Nor do we feel that it was essential that the Government show that Harms directed or knew that Bruno would travel by interstate carrier. Having shown the knowing inducement or persuasion of Bruno to come from New Jersey to Virginia and the fact of the resultant trip by interstate carrier, the Government had covered the essential elements necessary to justify a conviction under Section 2422. It was not necessary for the Government to go further and attempt to show that Harms knowingly caused the victim to travel by common carrier either by direction or knowledge that the victim, Bruno, would use that mode of transportation. "Cause" is a word of very broad import and its meaning is generally known. See United States [redacted] Kenofskey, 243 U.S. 440, 37 S.Ct. 438, 61 L.Ed. 836. The knowing persuasion to make the interstate trip, of course, must be shown with some degree of particularity, but once the knowing persuasion has been shown, if the trip by interstate carrier follows, the offense is complete. In considering the comparable statute (18 U.S.C. § 399) prior to the revision of the Criminal Code in the case of United States [redacted] Saledonis, 2 Cir., 93 F.2d 302, 304, the Court stated:

> "It is also suggested that there must be some direct act showing an intent on the part of the inducer

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that the transportation shall be by common carrier. This section does not say so, but plainly says that one who induces and who shall 'thereby knowingly cause' interstate commerce by common carrier is guilty of the offense if such transportation follows: An affirmative directive act is not involved. The inducement in and of itself, without consideration of intent and with no further direct act, is the moving cause of what follows. The inducement may be any offer sufficient to cause the woman to respond. The inducement sets in motion the successive acts that constitute the crime. It is unnecessary to show control of the medium of transportation by the inducer. It is sufficient if the accused knows or should have known that interstate transportation by common carrier would reasonably result and if it does."

[4] We agree with the above language to the effect that the requisite inducement is any offer sufficient to cause the woman to respond, and that since the appellant knowingly induced or persuaded Bruno to make the trip then she "knowingly caused" Bruno to travel by interstate carrier within the meaning of the statute.

The evidence with respect to the third count involving Linda Fay Ponder presents a different situation. As to this count the evidence shows that sometime prior to January 21, 1957, Ponder made a call from Detroit, Michigan, to Harms in Norfolk, asking Harms if she could come to Norfolk to work for her as a prostitute. After questioning her in regard to her age and appearance, Harms agreed that she would have a place for Ponder. Ponder later called Harms again, asking if Ann [redacted] could come with her, to which Harms agreed. Both Ponder and [redacted] traveled to Norfolk by interstate air line carrier on January 21, 1957. Upon their arrival at the Norfolk Airport, Ponder called Harms and pursuant to that call a meeting place was arranged and thereafter both Ponder and [redacted] engaged in acts of prostitution in Harms' establishment.

[5, 6] The evidence indicated that Harms knew neither of these women prior to the time of their arrival in Norfolk. The evidence also shows that both telephone calls were initiated by Ponder and that it was her suggestion that both she and [redacted] come to work for Harms. The evidence fails to show that Harms knew that Ponder was making the call from any point outside of the State of Virginia. While we do not know that Harms would have been deterred or acted otherwise than she did had she known that Ponder and [redacted] were calling from Detroit, nevertheless we feel that the absence of evidence of such knowledge on the part of Harms has an important bearing on the validity of the conviction on this third count. The constitutionality of the White Slave Traffic Act has been upheld as a proper exercise of the powers of Congress solely under the commerce clause of the Federal Constitution, art. 1, § 8, cl. 3. Hoke [redacted] United States, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523. Accordingly, the gravamen of the offense is the inducement or persuasion to travel in interstate commerce for the immoral purposes set forth in the Act. The immoral acts or pursuits in themselves are exclusively the subject of regulation under the police power of the state where they are committed. The statute makes the intent to transport the woman in interstate commerce for such immoral purposes an element of the crime. United States [redacted] Grace, 2 Cir., 73 F.2d 294; Sloan [redacted] United States, 8 Cir., 287 F. 91. It seems clear that the Government must present evidence showing the intent of the defendant in regard to the interstate aspect of the offense. This intent of the defendant must necessarily exist prior to, or concurrent with the interstate trip of the victim. Alpert [redacted] United States, 2 Cir., 12 F.2d 352; United States [redacted] Grace, supra. With respect to the third count, there is no evidence which would show that Harms had knowledge that she was inducing or persuading Ponder to make an interstate trip to take

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her place in the admittedly illegal establishment of Harms. The record shows that the District Judge granted a motion for judgment of acquittal with respect to the fourth count involving Ann Miller, and it is our opinion that the Court should likewise have granted the motion for judgment of acquittal on the third count for the reason set forth above.

[7] With respect to the fifth count charging Harms, Cousins and Day with conspiracy, as we have already noted the District Court granted a motion for judgment of acquittal as to the defendant, Day. While the indictment in the conspiracy count specified the period from November, 1955, to the date of the indictment, as a result of the disposition of the first count, the District Judge in his charge to the jury indicated that the conspiracy, if any, did not take place until shortly prior to January 7, 1957. We think the Court acted correctly in so confining the period of the alleged conspiracy and the question before us is whether the evidence supports the jury's verdict on the conspiracy count pursuant to such charge.

The evidence shows that Harms and Cousins are sisters and were together in a house of prostitution in Norfolk in 1954. However, Cousins moved to Florida in the early part of 1955, and with the exception of "two or three visits a year," did not return to Norfolk until sometime after January 1, 1957. The evidence further shows that whenever she came to Norfolk during that period she stayed at the residence of her sister, Harms.

Unquestionably, Cousins evidenced the same lack of moral fibre as her sister, and was a willing helper to her sister in running her establishments when the occasion demanded. Her assistance in a number of instances is clearly shown by the evidence. It is equally clear, however, that Harms was the "madam" and controlled both the purse and policy of the business. The maid, Rebbie Knight, in speaking of Cousins' activities, stated, "Well, she would maybe try to give her sister a hand, but it was her sister's business."

Undoubtedly, there was a sufficiency of evidence to convict Cousins of conspiracy to maintain a house of prostitution, but it does not necessarily follow that the evidence was sufficient on the charge of conspiracy to violate the White Slave Act in this case. Concededly, Cousins was absent from active participation on the Norfolk scene from early 1955 until after January 2, 1957. The government agent who had Harms under surveillance during that period testified that he had never seen Cousins during that entire time nor until sometime after January, 1957. She was not in Norfolk at the time of the call from Harms to Bruno. Under the circumstances, it would appear on the evidence that the conspiracy necessarily had to come into being, if at all, subsequent to the telephone call to Bruno and prior to her arrival at Norfolk Airport on January 7th. There is no direct evidence of any agreement between Cousins and Harms, and, accordingly, the conviction of Harms on the alleged conspiracy rests solely on inferences drawn from her overt acts together with the other evidence presented in this case.

[8, 9] The overt acts of Cousins placed her under a high degree of suspicion. However, proof of overt acts in themselves is not sufficient, for it must be established that the conspiracy or agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act or acts. Dahly v. United States, 8 Cir., 50 F.2d 37; United States v. Grossman, D.C., 55 F.2d 408. There must be proof of the unlawful agreement, either expressed or implied, and participation with knowledge of the agreement. Davidson v. United States, 8 Cir., 61 F.2d 250. The agreement of conspiracy may, of course, be proven and established by circumstantial evidence. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; Clune v. United States, 159 U.S. 590, 16 S.Ct. 125, 40

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L.Ed. 269. Even though it is not necessary that such circumstantial evidence exclude every reasonable hypothesis consistent with innocence,[1] nevertheless, the evidence should be sufficient to prove this element of the crime beyond a reasonable doubt. As was stated in Dahly v. United States, supra, "circumstantial evidence is equally available with direct evidence to prove the conspiracy, but suspicion or conjecture cannot take the place of evidence. Guilt must be established beyond a reasonable doubt, and, where the evidence is as consistent with innocence as with guilt, no conviction can properly be had." [50 F.2d 43.]

[10] When the evidence with respect to Cousins is appraised in this light, it occurs to us that it is not of such convincing degree as to warrant more than a mere probability or conjecture of guilt. With a total absence of direct proof of the essential agreement between Cousins and Harms, we feel that the inference drawn from the evidence with regard to Cousins on the fifth count is "so tenuous as to amount to mere speculation." See Call v. United States, 4 Cir., 265 F.2d 167, 173. We do not believe that the sum of the circumstantial elements in the record in this case is sufficient to support the conviction of the defendant Cousins on the conspiracy count; and since a person cannot conspire with himself or herself, it necessarily follows that the motion of both defendants as to the fifth count should have been granted.

[11] Our conclusion requires the reversal of the conviction of Cousins and her discharge from further proceedings. Harms, however, received a general sentence of thirty months and a fine of $1,000.00 imposed jointly upon counts two, three and five. We have found that she was improperly convicted on counts three and five. However, the penalty imposed upon her does not exceed that which might have been imposed under the second count had it stood alone. The conviction on the second count being sufficient in itself to support the sentence, we must affirm the conviction of Harms. Claassen v. United States, 142 U.S. 140, 12 S.Ct. 169, 35 L.Ed. 966; Whitfield v. State of Ohio, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778.

Affirmed in part, reversed in part and remanded.

Travis BUFORD, Appellant,
v.
UNITED STATES of America, Appellee.
No. 16405.

United States Court of Appeals Ninth Circuit.
Nov. 2, 1959.
Rehearing Denied Dec. 10, 1959.

Defendant was convicted of two substantive violations of narcotics laws and conspiracy. The United States District Court for the Northern District of California, Southern Division, Michael J. Roche, J., rendered judgment, and defendant appealed. The Court of Appeals, Healy, Circuit Judge, held that where informer had visited defendant's barber shop while equipped with radio transmitter and narcotics agent stated that he passed by barber shop's entrance after informer had gone in, saw defendant and heard her make certain statement, at same time agent listening to radio receiver heard same statement, and defendant subsequently admitted that it was her conversation with informer to which government agent had listened on radio transmitter device, defendant's voice was identified sufficiently to allow in evidence the admissions overheard by federal agents.

Affirmed.

1. Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150.

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Edward Raymond EGE, Joseph Boyd and Joseph Victor Bruno, Appellants,

v.

UNITED STATES of America, Appellee.

No. 14955.

United States Court of Appeals Ninth Circuit.

April 1, 1957.

Rehearing Denied May 15, 1957.

One defendant was convicted of transporting woman from California to Arizona for purposes of prostitution and such defendant and remaining two defendants were convicted of conspiring to transport women between California, Arizona, and Nevada for purposes of prostitution. The United States District Court for the Northern District of California, Southern Division, Edward P. Murphy, J., entered judgment, and defendants appealed. The Court of Appeals, Chambers, Circuit Judge, held that, where the one defendant gave prostitute $50 for her expenses in traveling from San Francisco to house of prostitution in Arizona and made arrangements for the prostitute with another prostitute who was driving to the same destination, defendant persuaded and induced the prostitute to make the trip for purposes of prostitution in violation of the Mann Act, and that evidence sustained conviction of two of the alleged conspirators but not conviction of the third.

Judgment affirmed in part and reversed in part.

1. Prostitution ⇐1

Where defendant gave prostitute $50 for her expenses in traveling from San Francisco to house of prostitution in Arizona and made arrangements for prostitute with another prostitute who was driving to the same destination, defendant persuaded and induced prostitute to make the trip for purposes of prostitution in violation of the Mann Act. 18 U.S.C.A. §§ 2421, 2422.

2. Conspiracy ⇐47

In prosecution for conspiring to transport women between several states for purposes of prostitution, evidence sustained conviction as to two of the alleged conspirators but not as to the third. 18 U.S.C.A. §§ 371, 2421 et seq., 2422.

3. Criminal Law ⇐829(1)

In prosecution for conspiring to transport women between certain states for purposes of prostitution, requested instruction that jurors would have to agree on at least one of the overt acts was proper, but refusal to so charge was not reversible error, in view of fact that instructions given, when properly interpreted, gave jury such requirement of unanimity. 18 U.S.C.A. §§ 371, 2421 et seq., 2422.

4. Criminal Law ⇐1044

If defendant does not move for directed verdict, he is not entitled to a review of the sufficiency of evidence.

Walter M. Campbell, Lillie & Bryant, Los Angeles, Cal., Robert B. McMillan, Leo R. Friedman and George T. Davis, San Francisco, Cal., for appellants.

Lloyd H. Burke, U. S. Atty., Richard H. Foster, Asst. U. S. Atty., San Francisco, Cal., for appellee.

Before STEPHENS, CHAMBERS and BARNES, Circuit Judges.

CHAMBERS, Circuit Judge.

Ege, Boyd and Bruno have run afoul of the Mann Act.[1] A young California girl who had renamed herself Cindy was their pawn.

As a child through the normal school years, Cindy had been moved from one foster home to another. After nine years of school, she started to work. She was employed as a clerk by three San Francisco concerns, each in rapid succession. She then graduated to the chorus line of the burlesque follies. She seems to have been an habitue of the

1. See 18 U.S.C.A. § 2421 et seq.

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Sarong Club in San Francisco. At least in 1953 that club had among its clientele persons like the defendants Ege and Boyd who had commercial use for young women willing to accept their management in the prostitution field.

Ege maintained in San Francisco sort of a supply house of women (of whom Cindy became one) and Boyd and Bruno operated houses of prostitution where and when they could find local law relaxed. Eventually, Cindy and Ege argued. In the vernacular, "they fell out." And that seems to have given the federal agents their chance to make a case.

During her career, Cindy was sent by Ege to Scottsdale, near Phoenix, Arizona, where she worked in Boyd's "house" which operated there awhile. Then she returned to California where she came under the direct control of Bruno at his "house" at Delano, some thirty miles north of Bakersfield. During the end of her circuit she plied her trade a day or two at Las Vegas, Nevada. There had been intermediate stops for her in brothels at Suisun, Sacramento and Barstow, under the aegis of Ege. It is around the necessary crossing of state lines by Cindy that the government found the required "commerce among the states" and thus the applicability of the Mann Act. It asserted that Ege, Boyd and Bruno all had a hand in the operation.

Ege was indicted for transporting Cindy from San Francisco to Scottsdale for the purposes of prostitution. See 18 U.S.C.A. § 2421. A second count charged that Ege, Boyd and Bruno in violation of 18 U.S.C.A. § 371 did conspire together to commit an offense in that they and each of them did conspire in violation of 18 U.S.C.A. § 2421 knowingly "to transport women between California and Arizona and California and Nevada for the purposes of prostitution." The indictment then related a list of fourteen overt acts, mainly incident to shuttling Cindy about the country. There was further amplification of the overt acts in a bill of particulars.

A jury found Ege guilty on the first count which was his alone. On the second or conspiracy count, Ege, Boyd and Bruno were all found guilty. Each was sentenced to five years on the conspiracy charge and Ege was given an additional five years on his single count. Ege's sentences run consecutively.

The single count against Ege

[1] Ege's sole claim here concerning the first count is that the evidence of the government only showed that Ege may have "persuaded or induced" Cindy to go to Arizona from San Francisco in violation of § 2422 of Title 18, but that it was not shown that he "caused her to be transported," a violation of § 2421. Reliance is placed upon LaPage [redacted]. United States, 8 Cir., 146 F.2d 536, 156 A.L.R. 965. In that case, a woman was on vacation in Minneapolis from her employment as an inmate in a brothel in Fargo, North Dakota. The keeper of the house telephoned her and requested that she return. It was understood that she would resume her old employment in Fargo. The woman returned as requested, but paid her own way. Of course, in a loose sense LaPage did cause the woman to be transported in interstate commerce. But we assume that § 2421 requires a little more "causing" beyond just "persuading and inducing." Here Ege made the arrangements for Cindy with another woman in the trade, one Judy, (or he pointed to the arrangements) who was driving to the same Phoenix-Scottsdale destination. (Judy also was in the group of women controlled by Ege.) Ege gave Cindy $50.00 for her expenses to Phoenix, including share-the-ride expenses with Judy. This seems to have been no different than if he had presented Cindy with a plane or train ticket and told her to go. It is the same as if he handed Cindy the money and had taken her to the ticket window to make the purchase of a transportation ticket to Phoenix. Such conduct goes, we hold, beyond mere persuading or inducing. We hold that when the man puts up the money in advance, when

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it is used for the interstate trip by the woman in accordance with his plan, when he has persuaded and induced her to make the trip for the purposes of prostitution, he has also caused the woman to be transported in violation of § 2421. Thus, we distinguish LaPage's case.

The sufficiency of the evidence against Ege and Boyd on the conspiracy count

Ege, the small booking agent and manager of prostitutes, operated from a home in San Francisco on which he had assumed the lease of Boyd. Boyd was in Arizona at Scottsdale near Phoenix operating his brothel in September-October, 1953.

[2] Ege took the witness stand in defense. Boyd and Bruno did not. They rested when the government closed its case in chief. We think within the limits of Dyer v. MacDougall, 2 Cir., 201 F.2d 265, and Bennett [redacted]. United States, 9 Cir., 234 F.2d 675, the jury was entitled to draw many affirmative inferences from the improbabilities of Ege's story. These, when added to the evidence in chief, make hollow any claim by Ege that there was insufficient evidence of conspiracy as to him.

And as to Boyd, we have the following:

1. The fact that before Cindy went with Judy in 1953 to Arizona Boyd and Ege knew each other.

2. Efforts of Ege in September, 1953, to "place" Cindy somewhere.

3. Ege dispatches Cindy, transportation prepaid, to Scottsdale along with the above-mentioned Judy.

4. Boyd at Scottsdale received Cindy and puts her to work for a week or two in the trade at his brothel.

5. Boyd's verbal act at Scottsdale in soliciting customers for his house when he stated that he was bringing over two women from California.

6. The quick appearance thereafter of Cindy at Scottsdale along with Judy straight from Ege's quarters in San Francisco.[2]

7. Evidence that Boyd did make many calls to San Francisco from his motel late in September, 1953, and in October.

8. Boyd's subsequent admissions that he had telephoned Ege at San Francisco from Phoenix or Scottsdale, apparently around the time Cindy was going to and she was working for him in his house at Scottsdale.

Out of the foregoing, the jury was entitled to infer from the circumstances that there a conspiracy had been formed in September, 1953, between Ege and Boyd to transport Cindy to Arizona from California for Mann Act purposes and to infer that it was executed. There is no shortage of evidence of at least one overt act, as charged, and of the commencement of the act in the Northern District of California, and thus proper venue.

Bruno and the conspiracy

Bruno appears to have been an old and experienced operator in the brothel field. We have little doubt that as such he probably knew when he ordered a woman from Ege that she would be one whom Ege was shuttling here and there and over interstate lines. We strongly suspect that Bruno made the arrangements with Ege for Cindy to fly from Phoenix to Bakersfield via Los Angeles before she rode with him from Bakersfield to Delano, there to work at her new profession and thus profit Ege and Bruno. But the evidence is just too weak to hold Bruno for a violation of the Mann Act on the record here.

Backtracking for a moment, the evidence amounts to this: Apparently, without Boyd's knowledge,[3] Cindy at Scottsdale in October, 1953, talked on the

2. During Cindy's stay at Boyd's "house" in Scottsdale there seem to have been three girls serving the trade there. The origin of one girl is not shown. But Cindy and Judy were "two girls from California."

3. That is, there are no facts in evidence that Boyd knew in advance, or simultane-

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telephone to Ege at San Francisco. Ege told her to promptly fly to Bakersfield from Phoenix and to go to work at Delano for Bruno. She followed instructions. Ege directed that when she reached the transfer stop at Los Angeles en route from Phoenix she should telephone Bruno at a Delano number. This she did, but she refused to state positively that she talked to Bruno when she made the call. Upon her arrival at the Bakersfield airport, Bruno meets her in his Cadillac. He takes her to Delano where she works in the trade for him. We only know from evidence inadmissible against Bruno that Boyd and Bruno knew each other. Undoubtedly, Ege and Bruno knew each other.

We think there is a permissible weak legitimate inference that Bruno and Ege had formed a conspiracy. It would have been stronger if Cindy had testified she telephoned and talked to Bruno on the telephone upon arrival at Los Angeles. There is nothing that shows that Bruno ever knew from whence Cindy came to Los Angeles where she made the telephone call to Bruno's number. Cindy was not asked if Bruno knew from whence she came. She was not asked if Bruno said anything indicating he knew she was under Ege's exclusive management, or if Bruno had said anything about arrangements with Ege. Perhaps, it would have been futile to ask. It is obvious that Cindy's testimony disappointed the government. It seems obvious she was scared.

While a conspiracy shown to exist is ordinarily presumed to continue (and it probably did), yet here the strongest inference under the evidence is that the original one started by Ege and Boyd stopped when Cindy left Boyd's place. There is no showing that Boyd helped her on her way to Bruno—no transportation of Cindy to the Phoenix airport on departure or final conversations with Boyd. No witnesses testified to any admissions by Bruno. There just is not enough competent evidence on Bruno as to the formation of a new conspiracy between Ege and Bruno, or a continuation of the old Boyd-Ege conspiracy. Thus, we do not reach the contentions spinning around the claim that we have here a charge of one conspiracy and proof of two.

Specifications affecting all conspiracy defendants

It is specified that the court erred in not instructing the jury that the jurors must all agree on at least one of the overt acts. With much force the defendant Boyd argues, in effect, each juror might have selected his own overt act to the exclusion of others: that the jurors may have "tacked" overt acts without all actually agreeing on any one. At first impression, it seems a powerful argument. We reject it nonetheless.

The jury instructions included:

1. "You must find * * * Fourth, that one of the conspirators [after the formation of the conspiracy] knowingly committed at least one of the overt acts charged in the indictment;"

2. "Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, the defendant has the right to rely upon a failure of the prosecution to establish such proof."

3. "You must consider each count separately as though each was set forth in a separate indictment, and in order to convict or acquit the defendant on any count, you must reach a unanimous verdict as to each count. It will take all twelve of you to convict or acquit, as the case may be, on each count."

4. "It is not necessary, as I have indicated, that all the overt acts charged be proved, but it is necessary that at least one of these be proved and that it be shown to have been in furtherance of the object of the conspiracy. Other overt acts

ously with the telephone call, that Ege was pulling Cindy away from Boyd and sending her to Bruno. If any inference is permissible it is that Boyd did not know.

than those charged may be given in evidence, but proof of one of those charged in the indictment is indispensable."

One's first impression is that defendant's request for the highly specific instruction on unanimity should have been granted. And it is easy to say, "The requested instruction would be a correct one. Why not give it? It would do no harm."

Yet if each juror selected his own overt act from the list, that would be a misconstruction of the instructions as given. There is no positive insurance against a jury going "haywire." Those of us who believe in the jury system, believe that the jury usually does not get mixed up. We believe the margin for error is less in simple instructions.

[3] In the preparation of instructions, it is always a question of balance. If every instruction is granted that is not improper, either at the request of the defense or the government, the skein can get so twisted, snarled and knotted that the opportunity for jury error increases. If sufficient and not wrong, brevity should be a fetish. More even justice will be done when simplicity is achieved, assuming adequacy is accomplished. The requested instruction was proper. We think its refusal was not error; at least not reversible error.

Anent this point, Boyd has argued that in the absence of an express instruction for unanimity on one overt act there was error in the absence of a special verdict which was not submitted. Above we have given our answer. Akin to this question is Bruno's contention that a special verdict should have been submitted to the jury on the overt acts.

The treason cases of Cramer v. U. S., 325 U.S. 1, 65 S.Ct. 918, 89 L.Ed. 1441, and Haupt v. U. S., 330 U.S. 631, 67 S.Ct. 874, 91 L.Ed. 1145 are cited.

First, we can say that the overt act of the crime of treason of Article III, § 3 of the Constitution is a substantial part of the crime. Insubstantial overt acts may qualify to move a garden variety of conspiracy agreement into the zone of crime and away from "talking" and "thinking." Yet such overt acts may fall short of the substance required for a treasonable overt act. Thus, in a way, treason is sui generis.

Second, here no objection was made to the submission to the jury of some overt acts upon which the evidence failed. Really the substantial question for the jury's consideration here was whether a conspiracy existed at all.

Assuming the conspiracy, a claim that there was no overt act is rather hollow. Nonetheless, the defendants were entitled to have the jury (not the trial court, not this court) determine originally the question of the existence of an overt act.

But the court's failure on its own motion (even yet not excepted to) to withdraw certain overt acts from the jury must be viewed in the light of the fact that the proof shows almost conclusively the existence of an overt act.

The Cramer case we do not regard as a harbinger of a holding that conspiracy cases require a special verdict on the overt acts. We believe that the decision there would have been affirmed if there had been sufficient proof for a jury issue on each overt act. Doubtless the submission of each overt act was thoroughly objected to and the objection overruled. Here in Boyd's and Ege's case no objection was made on submitting to the jury the full list of alleged overt acts. Treason is a crime that gets special treatment almost all of the way.

[4] At the trial, attorneys (other than those severally representing the defendants now) made their defense mainly on the ground of no conspiracy. Additionally, they offered to the district judge the rejected instruction on unanimity on one overt act. As we have indicated above, we think the instructions as given, properly interpreted, gave the jury this requirement of unanimity. If a defendant does not move for a directed verdict (these defendants did), he is not entitled to a review of the sufficiency of evidence. We think it of far less consequence to a defendant to hold, as we

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do here, that it was not error to remove from the jury's consideration some stray overt act, when it was never requested that such be done. Not having requested the withdrawal of certain alleged overt acts, we thus find complaints are made that "unanimity on one overt act was not required" and "there should have been a special verdict." These, we hold to be without merit.

The judgment is affirmed as to Ege and Boyd and reversed as to Bruno.

Sylvan LEMAIRE, on behalf of himself and all other bondholders of Kentucky and Indiana Terminal Railroad Company, similarly situated, Plaintiff-Appellant,

v.

KENTUCKY AND INDIANA TERMINAL RAILROAD COMPANY, The Baltimore and Ohio Railroad Company, Chicago, Indianapolis & Louisville Railway Company and Southern Railway Company, Defendants-Appellees.

No. 177, Docket 24204.

United States Court of Appeals
Second Circuit.

Argued Jan. 22, 1957.

Decided April 2, 1957.

Class action by bondholder to obtain judgment declaring amount of principal and interest payable on bonds which were issued by American corporation in England and which were designated as gold coupon bonds. The United States District Court for the Southern District of New York, John M. Cashin, J., 140 F.Supp. 82, rendered judgment declaring that they were payable in current British tender; the bondholder appealed. The Court of Appeals, Clark, Chief Judge, held that under "coupon gold" bonds, properly construed, issuer did not undertake to make bondholders whole in event Great Britain went off gold standard, and bonds were payable in current British legal tender rather than at gold value.

Affirmed.

1. Courts ⇐359

In case tried in Federal Court sitting in New York, New York law as to choice of law was controlling.

2. Bonds ⇐49, 103

Under New York law, questions of construction and performance of bond agreement payable in England would be governed by English law.

3. Payment ⇐12(1)

Under English law, "gold" in a payment clause may have three possible meanings: (1) to prescribe commodity in which payment must be made; (2) to prescribe that payment shall be made at gold value; (3) to prescribe nothing, but to describe composition of currency presently lawful in country of payment.

See publication Words and Phrases, for other judicial constructions and definitions of "Gold".

4. Payment ⇐12(5)

Under "coupon gold" bonds which were issued by American corporation in Great Britain in 1911 and which contained promise to pay bearer £100 sterling money of Great Britain at London with interest payable in gold, properly construed, issuer did not undertake to make bondholders whole in event Great Britain went off gold standard and bonds were payable in current British legal tender rather than at gold value.

Milton Pollack, New York City (Samuel N. Greenspoon, New York City, on the brief), for plaintiff-appellant.

Ralph M. Carson, of [redacted] Polk, Wardwell, Sunderland & Kiendl, New York City (Thomas O'G. FitzGibbon and Francis W. Phillips, of [redacted], Polk, Wardwell, Sunderland & Kiendl, New

28 U.S.C. § 1402(b) (1952) plainly relate to venue and not to jurisdiction * * *." Abramovitch v. United States Lines, 174 F.Supp. 587, 591–592 (S.D. N.Y.1959); cf. Hoiness v. United States, 335 U.S. 297, 301–302, 69 S.Ct. 70, 93 L.Ed. 16 (1948).

This issue need not be resolved here, for even if transfer were available, plaintiff has not shown where such transfer would be in the interests of justice. Plaintiff is not barred from recommencing this action against the United States in the appropriate district. The accident which forms the basis of this action occurred on December 16, 1960. Plaintiff is thus well within the two-year statute of limitations. 28 U.S.C. § 2401 (b).

Since plaintiff is neither a resident of this district, nor has she persuaded this court that an act or omission occurred in this district, she has failed to comply with 28 U.S.C. § 1402(b). Accordingly, the motion of the United States to dismiss is granted.

Settle order on notice within ten (10) days.

UNITED STATES of America

v.

William Michael AUSTREW also known as Bill [redacted]

Harold Sapperstein

and

Anne Sapperstein.

Crim. No. 24648.

United States District Court
D. Maryland.
Feb. 26, 1962.

The defendant was charged in a four-count indictment with violations of the White Slave Traffic Act. The District Court, Northrop, J., held that evidence warranted convictions under all four counts, and that conversations between defendant's co-defendants and two of the victims prior to transportation of victims, to show corroboration between the defendant and co-defendants, the intentions of the defendant, and the purpose of the transportation, were admissible, though the conversations took place outside the presence of the defendant.

Defendant convicted.

1. Criminal Law ⇐304(16)

Federal District Court could take judicial notice of opinion of Chief Judge of District Court in prior prosecution in which defendant's co-defendants were found guilty.

2. Prostitution ⇐3

There was no fatal variance between first and second counts of indictment charging transportation of girls in interstate commerce for immoral purposes and evidence. 18 U.S.C.A. § 2421.

3. Indictment and Information ⇐71

Indictment need only furnish accused with such description of charge against him as will enable him to make his defense and as will protect him against double jeopardy.

4. Criminal Law ⇐429(1)

Birth certificate of girl, who was allegedly transported in interstate commerce for immoral purposes, was admissible to show that she was under eighteen, though girl's first and middle names were transposed on birth certificate, where it was properly sealed and certified. 18 U.S.C.A. § 2423.

5. Criminal Law ⇐421(3)

Under exception to hearsay rule, testimony of one as to his age is sufficient to establish his age.

6. Prostitution ⇐4

Birth certificate of girl who was allegedly under age of 18 years, and who was allegedly transported in interstate

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commerce for immoral purposes, was sufficient to corroborate girl's own testimony as to her age, though birth certificate had her first and middle names reversed. 18 U.S.C.A. § 2423.

7. Criminal Law ⇐436

Telephone and telegraph company records were admissible to establish intimate involvement of defendant, who was charged with violations of White Slave Traffic Act, with co-defendants' enlistment of girls in another state. 18 U.S.C.A. §§ 2, 2421–2423.

8. Criminal Law ⇐423(1)

Where several persons are jointly indicted for commission of crime, and it is proved that they acted in concert to accomplish their end, evidence of declarations and acts of each, in furtherance of their criminal design, is admissible against all, even though conspiracy is not formally charged in indictment. 18 U.S.C.A. § 2.

9. Criminal Law ⇐423(2), 424(1)

Conversations between co-defendants of defendant, who was charged with violations of White Slave Traffic Act, and victims before transportation of victims were admissible to show cooperation between defendant and co-defendants, intentions of defendant, and purpose of transportation, though conversations took place outside presence of defendant, but testimony concerning statements and actions of co-defendants after transportation of victims was required to be stricken. 18 U.S.C.A. §§ 2, 2421–2423.

10. Prostitution ⇐4

Act of defendant, who is charged with violations of White Slave Traffic Act, in furnishing money used by victim in accordance with plan of defendant is sufficient to establish element of inducement. 18 U.S.C.A. §§ 2421–2423.

11. Prostitution ⇐1

Violation of Mann Act is complete when defendant knowingly induces interstate transportation of victim, and victim crosses state boundary, if defendant had intent that victim engage in immoral practice. 18 U.S.C.A. § 2421.

12. Prostitution ⇐4

Intent of defendant, who is charged with violation of Mann Act, that victim is to engage in immoral practice may be inferred from character of environment and subsequent conduct of parties. 18 U.S.C.A. § 2421.

13. Prostitution ⇐4

Evidence warranted conviction for violation of Mann Act. 18 U.S.C.A. § 2421.

14. Prostitution ⇐1

It was not necessary, in order to justify conviction of defendant for procuring girl in interstate commerce for immoral purposes and for inducing girl to travel in interstate commerce for immoral purposes, to prove that girl actually engaged in prostitution after being transported. 18 U.S.C.A. § 2422.

15. Prostitution ⇐4

Evidence warranted conviction of defendant for inducing girl, who had not attained her 18th birthday, to go in interstate commerce for purpose of engaging in immoral practices. 18 U.S.C.A. § 2423.

16. Prostitution ⇐4

Evidence warranted conviction of defendant charged with inducing girls to go in interstate commerce for purpose of engaging in immoral practices. 18 U.S.C.A. § 2422.

Joseph D. Tydings, U. S. Atty., John G. Underwood, and Carl J. Lorenz, Jr., Asst. U. S. Attys., Baltimore, Md., for plaintiff.

Nathan M. Cohen, Chicago, Ill., for defendant Austrew.

William F. Mosner, Towson, Md., for defendants Sapperstein.

NORTHROP, District Judge.

The defendant, William Michael Austrew, alias Bill [redacted], together with Harold Sapperstein and Anne Sapperstein, his wife, is charged in a four count in-

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dictment [1] with violations of the White Slave Traffic Act, 18 U.S.C.A. §§ 2421, 2422 and 2423 [2]; also, all of the named defendants are charged in all of the

1. The indictment reads as follows:
"FIRST COUNT: The Grand Jury for the District of Maryland charges:
"On or about the 13th day of July, 1957, in the District of Maryland,
WILLIAM MICHAEL AUS[redacted],
also known as BILL [redacted],
HAROLD SAPPERSTEIN,
and
ANNE SAPPERSTEIN
did knowingly procure and obtain Capital Airlines tickets to be used by certain girls, to wit, * * * Shirley Monroe, and Gladys Germaine Moyers, also known as Betty McLean, in interstate commerce, in going to Calumet City, Illinois, for the purpose of prostitution, debauchery, and other immoral purposes, and with the intent and purpose on the part of the said WILLIAM MICHAEL AUSTREW, also known as BILL DAVIS, HAROLD SAPPERSTEIN and ANNE SAPPERSTEIN, to induce, entice and compel the said girls to give themselves up to the practice of prostitution and to give themselves up to debauchery and other immoral practices, whereby the said girls were transported in interstate commerce.
"SECOND COUNT: And the Grand Jury for the District of Maryland further charges:
"On or about the 13th day of July, 1957,
WILLIAM MICHAEL AUSTREW,
also known as BILL DAVIS,
HAROLD SAPPERSTEIN,
and
ANNE SAPPERSTEIN
did knowingly persuade, induce, entice and coerce certain girls, to wit, * * * Shirley Monroe, and Gladys Germaine Moyers, also known as Betty McLean, each of whom had not then attained her eighteenth birthday, to go from Friendship Airport, in the State and District of Maryland, to Milwaukee, Wisconsin, by common carrier, to wit, Capital Airlines, in interstate commerce, with intent that the said girls be induced and coerced to engage in prostitution, debauchery, and other immoral practices.
"THIRD COUNT: And the Grand Jury for the District of Maryland further charges:
"On or about the 11th day of July, 1957, in the District of Maryland,
WILLIAM MICHAEL AUS[redacted],
also known as BILL [redacted],
HAROLD SAPPERSTEIN,
and
ANNE SAPPERSTEIN
did knowingly procure and obtain a Capital Airlines ticket to be used by a certain girl, to wit, Dora Estelle Heathcote, also known as Laura Anderson, also known as Sandra Lester, in interstate commerce, in going to Calumet City, Illinois, for the purpose of prostitution, debauchery, and other immoral purposes, and with the intent and purpose on the part of the said WILLIAM MICHAEL AUSTREW, also known as BILL DAVIS, HAROLD SAPPERSTEIN, and ANNE SAPPERSTEIN, to induce, entice, and compel the said girl to give herself up to the practice of prostitution, and to give herself up to debauchery and other immoral practices, whereby the said girl was transported in interstate commerce.
"FOURTH COUNT: And the Grand Jury for the District of Maryland further charges:
"On or about the 11th day of July, 1957,
WILLIAM MICHAEL AUSTREW,
also known as BILL DAVIS,
HAROLD SAPPERSTEIN,
and
ANNE SAPPERSTEIN
did knowingly persuade, induce, entice, and coerce a certain girl, to wit, Dora Estelle Heathcote, also known as Laura Anderson, also known as Sandra Lester, to go from Friendship Airport, in the State and District of Maryland, to Chicago, Illinois, in interstate commerce, for the purpose of prostitution and debauchery and for other immoral purposes, and with the intent and purpose on the part of the said WILLIAM MICHAEL AUS[redacted]TREW, also known as BILL [redacted], HAROLD SAPPERSTEIN and ANNE SAPPERSTEIN, that the said girl should engage in the practice of prostitution and debauchery and other immoral practices, and thereby the said WILLIAM MICHAEL AUSTREW, also known as BILL DAVIS, HAROLD SAPPERSTEIN, and ANNE SAPPERSTEIN, did knowingly cause the said girl to go and to be carried and transported as a passenger upon the lines and routes of common carriers in interstate commerce, to wit, National Airlines and Capital Airlines."

2. Chapter 117—White Slave Traffic
"§ 2421. Transportation generally
"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or com-

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counts as principals under the Aiding and Abetting Section, 18 U.S.C.A. § 2.

A motion for separate trials, made on behalf of Austrew, was granted on September 26, 1961, and the Sappersteins were tried before Chief Judge Thomsen of this court and convicted on all four counts. United States v. Sapperstein, 198 F.Supp. 147 (D.Md.1961).

Austrew was tried without a jury commencing on October 25, 1961. At the conclusion of the evidence and upon the request of counsel on both sides, permission was granted for all argument and rebuttal to be made in the form of written memoranda; this accounts for much of the delay in the rendition of this opinion and verdict.

FINDING OF FACTS

Austrew is the manager and lessee of a night club owned by Amos Amadio, known as the Derby Club, in Calumet City, Illinois. One of apparently many such clubs in this town just outside of Chicago, the Derby Club provides an outlet for its patrons' taste for alcohol, strip-dancing, sexual intercourse, and other illicit low-life activities. Though there was some conflict in the evidence on this point, it is reasonably clear that there was a cot in a rear room of this club, where patrons and prostitutes in the employment of Austrew engaged in sexual intercourse. Some time prior to the period with which we now are concerned, Anne Sapperstein worked at the Derby Club, where her principal activities were pocket-picking and B-drinking, that is, soliciting drinks from customers.

In July of 1957, Anne Sapperstein and her husband, Harold, came to Baltimore. Shortly after their arrival in this city, they met one of the alleged victims, Dora Heathcote, to whom they offered employment as a barmaid at the Derby Club. Heathcote accepted, and the Sappersteins then obtained money for her trip to Calument City at the Baltimore office of the Western Union Telegraph Company.

pel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

"Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States—

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"§ 2422. Coercion or enticement of female

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl to go from one place to another in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and thereby knowingly causes such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"§ 2423. Coercion or enticement of minor female

"Whoever knowingly persuades, induces, entices, or coerces any woman or girl who has not attained her eighteenth birthday, to go from one place to another by common carrier, in interstate commerce or within the District of Columbia or any Territory or Possession of the United States, with intent that she be induced or coerced to engage in prostitution, debauchery, or other immoral practice, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

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This money was sent to the Sappersteins by Austrew, pursuant to two collect telephone conversations between them. There can be no doubt about this transaction and Austrew's part in it, for it is firmly established by the records of the telephone and telegraph companies and by Austrew's own testimony.

Part of the money sent by Austrew was used to purchase an airline ticket for Heathcote in the name of Laura Anderson. With at least a portion of the balance the Sappersteins bought the victim a set of luggage, helped her pack, and drove her to the airport; there they gave her Austrew's name and description, supplied her with the telephone number of the Derby Club, and put her on the plane. This was a National Airlines flight, which took her to Washington, D. C., where she boarded a Capital Airlines plane bound for Chicago.

no discussion of prostitution until after she arrives in new city

On Friday, July 11, Heathcote arrived in Chicago and was met at Midway Airport by Austrew, who drove her to Calumet City and the Derby Club. During this drive and for some time after they reached the club, Austrew and the victim engaged in a conversation in which he informed her that there were no barmaid positions available, as they were all filled by men, but that she "could either dance, B-drink, or hustle." Although the defense has suggested that by "hustle" was meant "hustle drinks", the only reasonable interpretation of this remark is that Austrew was asking Heathcote to engage in prostitution. Batsell [redacted] United States, 217 F.2d 257, at p. 262 (8th Cir.1954). By her spontaneous use of the disjunctive in relating her conversation from the witness stand, Heathcote indicated that she was confronted with not just two, but three, alternatives. This was her understanding and it must have been Austrew's intention.

At this same time Heathcote voiced displeasure with the prospects confronting her at the Derby Club, but, at Austrew's insistence, she agreed to wait until the Tuesday following her arrival before leaving. Austrew gave two reasons for requesting her to stay: first, so that he could confront the Sappersteins, upon their return from Baltimore, with her misunderstanding of the nature of her employment; and second, so that she would have a greater exposure to the activities of the club, which it was hoped would entice her to at least participate in the strip-dancing. In the following few days Heathcote observed life at the Derby Club, including B-drinking and nude dancing. But she was not altogether passive; during her brief stay in Calumet City, she herself danced upon at least two occasions, stripping to the nude each time.

In Baltimore, on Sunday, July 13, 1957, the Sappersteins met Shirley Monroe, a girl who was then but fourteen years of age. By a sequence of events similar to those which led to Heathcote's arrival in Calumet City, Monroe and a third victim, Gladys Moyers, were enticed into making the same trip, both traveling under assumed names. However, while Heathcote had been told that she was to be a barmaid, Monroe and Moyers were told that they were to be strip-dancers. Also, their flight to Chicago was diverted to Milwaukee because of poor weather conditions. Austrew, who testified that he had known the names of the two girls beforehand, eventually arrived at the Milwaukee airport, found the girls asleep there, and took them by car to Calumet City.

Once in Calumet City, Austrew took Monroe about the town. During the early morning hours, in a room over another Calumet City bar, the Four Aces Club, these two engaged in sexual intercourse. This fact, testified to by Monroe, was controverted by the defendant; furthermore, the defense contended that her testimony was contradicted also by that of a disinterested witness, Andrew Rambush. The court is of the opinion that Monroe is more credible on this point than Austrew. Also, there is nothing in Rambush's testimony that would contradict Monroe's version of the facts. Rambush testified that Austrew and Monroe arrived at his home, where she was to stay, some time after four o'clock

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in the morning and that Austrew left immediately thereafter; on the other hand, the victim testified that she had had intercourse with the defendant before—and not after—reaching Rambush's house. There is no inconsistency between these two statements.

The day after her arrival in Calumet City, Monroe left and went to Chicago, only to return to the Derby Club five or six days later. Either upon her first arrival in Calumet City or upon her return from Chicago—although the former alternative appears the more likely, the precise time is unclear—Austrew told her of her duties at the club; she was to strip-dance, B-drink, and "turn tricks in the back room." The victim testified that she understood the quoted phrase to mean that she was to prostitute herself with customers at the bar, the only reasonable interpretation to which this crude expression lends itself. United States v. Marks, 274 F.2d 15, at p. 17 (7th Cir.1959). In any event, there was an agreement between Monroe and Austrew whereby she was to turn over to him or to whoever was tending the bar the proceeds of her prostitution, a portion of which was to be returned to her on a percentage basis. Pursuant to this plan, she in fact did engage in prostitution for at least two nights, turned over the proceeds to Austrew, and received from him a percentage. Also, she once again had sexual relations with the defendant.

In addition to these activities, Monroe explored every phase of the debauched world that was the Derby Club. In particular, on several occasions she performed a strip-dance of a character too vulgar to relate. Such depravity, if it needs corroboration to bring it from the realm of degenerate fantasy into the realm of plausibility, was verified by a disinterested witness, William Zacharevich, who frequented the Derby Club during this period.

After a few days in Austrew's employment, Monroe left the Derby Club and went to work at another Calumet City night spot, the Cadillac Club. She stayed there for but one night and eventually returned to Baltimore.

CONCLUSIONS OF LAW

Before reaching the substantive law of this case, we must consider first several objections made by the defense on which rulings were reserved until this time.

[1] First, at the outset of the trial of this defendant, defense counsel objected to the court's taking judicial notice of Chief Judge Thomsen's earlier opinion in this case, in which the Sapperstein[redacted] were found guilty.[3] United States [redacted] Sapperstein, 198 F.Supp. 147 (D.Md.1961). This objection is wholly unmeritorious. McCormick, Evidence, § 326, at p. 695 (1954). Of course, while the court is cognizant of the law as it is expounded in that opinion, the factual determinations made there have not in any way influenced those made here.

[2, 3] A further objection alleges a fatal variance between the first and second counts of the indictment, both of which deal with the transportation of Monroe and Moyers, and the proof.[4] The first count charges the defendant with knowingly procuring airline tickets for the use of these girls "in interstate commerce, in going to Calumet City, Illinois, for the purpose of prostitution." On the face of it, this count allows two inferences: that the tickets were for the entire journey to Calumet City, or that they were for but a part of the journey. The latter inference is the more likely and conforms with the proof. The second count charges the defendant with knowingly persuading, inducing, enticing and coercing the victims "to go from Friend-

3. In making this objection, defense counsel did not refer to another opinion in this case, rendered by Judge Watkins. See United States [redacted] Austrew, 190 F. Supp. 632 (D.Md.1961).

4. The indictment is set out in full above. See No. 1.

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ship Airport, in the State of Maryland, to Milwaukee, Wisconsin, by common carrier." This charge does give the correct termini of the interstate transportation; but, in a technical and strict sense, it does not otherwise conform with the proof. If the defendant did induce Monroe and Moyers to travel, he did not induce them to travel to Milwaukee, but to Calumet City. However, slight variances such as this—if here there can be said to be a variance at all—consistently have been held not to be fatal. Hoke [redacted] United States, 227 U.S. 308, 33 S.Ct. 281, 57 L.Ed. 523 (1913); Bennett [redacted] United States, 227 U.S. 333, 33 S.Ct. 288, 57 L.Ed. 531 (1913); Mellor [redacted] United States, 160 F.2d 757 (8th Cir. 1947), cert. denied 331 U.S. 848, 67 S.Ct. 1734, 91 L.Ed. 1858 (1947). An indictment need only furnish the accused with such a description of the charge against him as will enable him to make his defense and as will protect him against double jeopardy. Under this sensible view, indictments have been upheld in which the transaction involved has been characterized broadly only as one in interstate commerce. United States [redacted] Austrew, 190 F.Supp. 632, at p. 636 (D. Md.1961); also United States [redacted] Hunt, 120 F.2d 592 (7th Cir.1941), cert. denied 314 U.S. 625, 62 S.Ct. 97, 86 L.Ed. 502 (1941); and Hughes [redacted] United States, 114 F.2d 285 (6th Cir.1940). An indictment such as this should not be set aside where its specificity is greater than that which the law requires—and certainly not where the alleged variance is so very trivial.

[4–6] Third, objection was made to the admissibility of a birth certificate, offered to prove the age of Shirley Monroe. The objection was based upon two grounds: first, that the certificate was improperly certified; and second, that there was no evidence to show that the person named in the certificate was the same as the prosecuting witness, as the certificate reverses her first and middle names. The objection is overruled. First, the document *was* properly sealed and certified. Hilliard [redacted] United States, 121 F.2d 992, at pp. 995–996 (4th Cir. 1941), cert. denied 314 U.S. 627, 62 S.Ct. 111, 86 L.Ed. 503 (1941). Second, despite the transposition of names, the witness correctly stated every other fact contained in the certificate, and this she apparently did without having seen it. The transposition is understandable; while it weakens the document's evidentiary value, it is not believed that such a defect makes it altogether inadmissible. Even if this were not so, under an exception to the hearsay rule of great antiquity, one's own testimony as to his age is sufficient. McCormick, Evidence, § 297, at p. 621 (1954); 5 Wigmore, Evidence, § 1493 (3rd ed. 1940). The birth certificate is deemed to be admissible for whatever probative value it might possess; it carries sufficient weight to corroborate the witness' own testimony as to her age.

[7] Fourth, objection was made to the admissibility of telephone and telegraph company records, submitted to establish Austrew's intimate involvement with the Sappersteins' enlistment program in Baltimore. This objection was based upon lack of relevancy and surely must be overruled. Even if the documentary evidence had not been proffered, Austrew's own testimony establishes the same fact; he admitted knowing of the Sappersteins' recruitments and sending them the money with which the victims were to travel from Baltimore to Calumet City. Also, Austrew admitted that he knew the names of these victims prior to meeting them at the two airports.

[8, 9] The fifth and final objection relates to the admissibility of conversations between the co-defendants Sappersteins and the two victim-witnesses, Heathcote and Monroe. All of these conversations took place outside the presence of the defendant and were persented to show cooperation between Austrew and the Baltimore procurers, the intentions of Austrew, and the purpose of the transportation. When, as here, several persons are jointly indicted for the commission of a crime and it is

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proved that they acted in concert to accomplish their end, evidence of the declarations and acts of each, in the furtherance of their criminal design, is admissible against all; and, this is true even though conspiracy is not formally charged in the indictment. Carpenter v. United States, 264 F.2d 565, at p. 572 (4th Cir.1959), cert. denied 360 U.S. 936, 79 S.Ct. 1459, 3 L.Ed.2d 1548 (1959); Hilliard v. United States, supra, 121 F.2d at p. 999 (dicta); Sprinkle v. United States, 141 F. 811 (4th Cir.1905). Austrew's own admissions and the corroborative records of the telephone and telegraph companies have provided that quantum of proof necessary to establish the fact that he and the Sappersteins acted in concert; therefore, the principle just stated is clearly applicable. However, under this same principle, all testimony concerning statements and actions of the Sappersteins *subsequent* to the transportation must be stricken. Hilliard v. United States, supra. As the statements of the Sappersteins *prior* to the transportation are deemed admissible only to show a state of mind, the exclusionary hearsay rule is quite irrelevant. McCormick, Evidence, § 228, at pp. 465–467 (1954); 6 Wigmore, Evidence, §§ 1766, 1770, 1772, and 1789 (3rd ed. 1940). It might be added that, even if all of the testimony to which this objection has been made were excluded *in toto*, the remaining evidence nonetheless is sufficient to sustain the facts and conclusions contained in this opinion.

Now, having disposed of these objections, we may reach the substantive law of this case.

[10] First, the interstate transportation is here well established in fact; this point need not be belabored, as it is admitted by the defense. And, it is well established in law that one need only to have provided the necessary money for the transportation to be deemed to have procured the tickets and the transportation oneself. Furthermore, the act of furnishing this money, which is used for the trip in accordance with the plan of the one supplying it, is sufficient to establish the element of inducement. Williams v. United States, 271 F.2d 703, at pp. 706–707 (4th Cir. 1959), citing Ege v. United States, 242 F.2d 879 (9th Cir.1957). So, Austrew directly and principally—not merely by imputation—procured the tickets and induced the victims to go to Calumet City, regardless of the involvement of the Sappersteins and regardless of the applicability of the aiding and abetting section. That he did not send the money to these girls directly, but used the aiding and abetting Sappersteins as a conduit, does not militate against this conclusion. Williams v. United States, supra. He clearly knew those for whom the money was intended, but even this knowledge is not essential to sustain the application of this principle. Pine v. United States, 135 F.2d 353 (5th Cir.1943), cert. denied 320 U.S. 740, 64 S.Ct. 40, 88 L.Ed. 439 (1943).

[11, 12] Under the Mann Act, the offense is complete when it is shown, as has been done here, that the defendant knowingly induced the interstate transportation and that the victim crossed a state boundary. However, this is true only where it is shown also that the defendant had the requisite intent and purpose that the victim "give herself up to the practice of prostitution, or * * * give herself up to debauchery, or any other immoral practice." 18 U.S.C.A. § 2421; Harms v. United States, 272 F.2d 478 (4th Cir.1959), cert. denied 361 U.S. 961, 80 S.Ct. 590, 4 L.Ed.2d 543 (1960). While the intention must exist prior to or concurrently with the transportation, it may be inferred from the character of the environment and the subsequent conduct of the parties. Athanasaw v. United States, 227 U.S. 326, 33 S.Ct. 285, 57 L.Ed. 528 (1913); United States v. Boyette, No. 8248, 299 F.2d 92 (4th Cir., January 6, 1962); Van Pelt v. United States, 240 F. 346 (4th Cir.1917); United States v. Marks, supra; Pine v. United States, supra. The wisdom of this rule is obvious; for, were the contrary true, all evidence re-

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lating to matters after the crossing of the state line and relating to the character of the destination would be excluded, with the undesirable result that an existing intent seldom would be established. Subjective facts are difficult to prove, because it is the rare case in which the party whose state of mind is the subject of inquiry has spoken. Typically, then, triers of fact must make reasonable inferences from the conduct of the party in question and the surrounding circumstances.

[13] From the facts in this case it is abundantly clear that Austrew, at all times, intended that these girls live a life of prostitution and debauchery. The degenerate character of the Derby Club, with its B-drinkers, pick pockets, strip-dancers, and one-bed brothel in the rear room; the use of assumed names; Austrew's substantial financial investment in these girls, somewhat in excess of $300.00; their inexperience with respect to the more innocuous activities for which Austrew claimed he wanted them; his telling Heathcote that she was to "hustle" and Monroe that she was to "turn tricks in the back room"; Heathcote's dancing in the nude; Austrew's engaging in sexual intercourse with Monroe upon her first night in Calumet City and after her return from Chicago; his successful attempt to induce her to prostitute herself; his financial arrangement with her, which was consummated; and Monroe's disgusting dance, performed more than once and with Austrew's apparent knowledge and approbation: all this establishes, beyond a reasonable doubt, Austrew's criminal intent. His dominant motive was that these girls engage in activities proscribed by the statute.[5] Any other conclusion would be frivolous and unmindful of the weight of the evidence.

With respect to the second count of the indictment, it is sufficient that only one of the two victims named therein be proved to have been under the statutory age of eighteen. Bennett [redacted] United States, supra.

[14] With respect to the third and fourth counts, the government was not required to prove that Heathcote actually engaged in prostitution. It is not an essential element of the offense that the defendant succeed in achieving his iniquitous end. United States [redacted] Marks, supra. Indeed, it is enough to prove that the environment into which the victim is brought "'would necessarily and naturally lead to a life of debauchery of a carnal nature relating to sexual intercourse between man and woman.'" Athanasaw [redacted] United States, supra, 227 U.S. 326, at p. 333, 33 S.Ct. 285, at p. 287. This has been proven here.

[15, 16] For the aforegoing reasons, the defendant, William Michael Austrew, also known as Bill [redacted], must be found guilty on all four counts.

5. See the discussion of Mortensen [redacted] United States, 322 U.S. 369, 64 S.Ct. 1037, 88 L.Ed. 1331 (1944), by Thomsen, Chief Judge, in United States [redacted] Sapperstein, 198 F.Supp. 147 (D.Md.1961).

BREVEL PRODUCTS CORP., Plaintiff,

[redacted]

H & B AMERICAN CORPORATION, Seidelhuber Steel Rolling Mill Corp., Big Boy Manufacturing Co. and Masters, Inc., Defendants.

United States District Court
S. D. New York.
Feb. 28, 1962.

Patent infringement action, in which one defendant moved to dismiss complaint on ground of improper venue. The District Court, Dawson, J., held that California manufacturer, which, as non-corporate subsidiary of Washington corporation, maintained no manufacturing facilities, offices, warehouses, or sales force in New York, and which solicited

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to ensure[ ] proper notice so a defendant is able to challenge the information ... [and] make an informed decision about whether or not to plead guilty." *Ante*, at 1226 (alterations in original) (internal quotation marks omitted). While I believe the majority imprudently relies on that purported purpose of the statute to trump the plain meaning of its language, even under such approach the government's statement *after* trial is irrelevant because it surely could not influence Sperow's decision to plead guilty or to proceed to trial.

Finally, contrary to the majority's assertion, I do not take the position that once the government files § 851 notice that satisfies the statutory requirements, it cannot later amend or withdraw that notice. But I simply cannot accept the majority's "apparent withdrawal" doctrine in this case, which has no basis in our precedents. *Ante*, at 1228. The majority's novel contraption, with little explanation or justification, places a new burden on the government of ensuring until the end of the proceedings that an objectively reasonable person would conclude that the government continues to seek an enhanced sentence based on a prior conviction. But such notion cannot be found in the statute.[5] Section 851 requires *notice*, "before trial, or before entry of a plea of guilty," of "the previous conviction to be relied upon" for the sentencing enhancement. And Sperow got it. The government's later amendment to the indictment (but not the § 851 notice) and its misstatement during trial were simply insufficient to operate as a withdrawal of the statutorily sufficient § 851 notice in this case.

III

In sum, I would affirm the district court's determination that the government's § 851 notice satisfied the statutory requirements. The government gave Sperow "fair notice of which prior conviction the government had in mind for seeking a sentence enhancement" and it did not withdraw that notice. *Severino*, 316 F.3d at 944. Accordingly, I must respectfully dissent.

UNITED STATES of America,
Plaintiff–Appellee,

v.

David Anthony GOETZKE,
Defendant–Appellant.

No. 05–30267.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 7, 2007.

Filed Aug. 1, 2007.

Background: Defendant was convicted in the United States District Court for the District of Montana, Jack D. Shanstrom, J., of attempting to persuade, induce, en-

5. In light of the majority's "apparent withdrawal" invention, a prosecutor may be wise in the future to file a terse notice containing only two sentences: (1) "The government seeks an enhanced sentence for the defendant's prior conviction for [identify prior conviction]"; and (2) "This notice is effective unless and until the government expressly amends or withdraws such notice in writing and signed by [name]." With such provision, no defendant could maintain a reasonable belief that the government apparently withdrew the previously filed § 851 notice based on a later amendment to the indictment or a slip of the tongue during the trial.

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tice, or coerce a minor to engage in unlawful sexual activity, and he appealed.

Holding: The Court of Appeals held that evidence was sufficient to support conviction.

Affirmed.

1. Infants ⇐20

The evidence that the defendant intended to violate the statute and took a substantial step in completing the violation was sufficient to support a conviction for attempting to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity; the defendant sent letters to a ten-year-old boy he had met when he and the boy were staying as guests in the same home, he made advances of a sexual nature to the boy in the letters, flattered him, described sex acts he wanted to perform on the boy, encouraged the boy to return to the home where they had met, which was in another state from the boy's residence, and promised him a motorcycle if he returned. 18 U.S.C.A. § 2422(b).

2. Criminal Law ⇐44

To constitute a substantial step toward the commission of a crime, for purposes of a conviction for attempt to commit a crime, the defendant's conduct must: (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose.

3. Criminal Law ⇐44

To constitute a substantial step toward the commission of a crime, for purposes of a conviction for attempt to commit a crime, a defendant's actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances.

4. Infants ⇐13

When a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity, as required for a conviction for attempting to persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity. 18 U.S.C.A. § 2422(b).

Mark T. Errebo, Errebo Law Offices, Billings, MT, for the defendant-appellant.

Marcia Hurd, Assistant United States Attorney, Billings, MT, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Montana; Jack D. Shanstrom, District Judge, Presiding. D.C. No. CR–04–00129–JDS.

Before: PAMELA ANN RYMER and SUSAN P. GRABER, Circuit Judges, and JOHN S. RHOADES, SR.,* District Judge.

PER CURIAM:

A jury found David Anthony Goetzke guilty of attempting to persuade, induce, entice, or coerce a minor, W, to engage in unlawful sexual activity in violation of 18 U.S.C. § 2422(b). In this timely appeal, Goetzke argues that the evidence presented at trial was insufficient to support a finding of guilt beyond a reasonable doubt. The facts are not in dispute. The issue is whether a rational jury could have found that Goetzke's conduct demonstrated an

* The Honorable John S. Rhoades, Sr., Senior United States District Judge for the Southern District of California, sitting by designation.

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intent to violate the statute and that he took a "substantial step" toward completing the crime. We conclude that a rational jury could, and we affirm.

I

In the summer of 2003, AG lived in Louisiana with her 10–year–old son W, who was developmentally disabled. At the suggestion of her husband, who was then working in Kuwait, AG sent W to a Montana ranch owned by a family friend, Ray Fettig, so that W might spend the summer in the great outdoors as his father had done as a child. Five or six days into the trip, AG learned that Goetzke, a registered sex offender whose sexual preference is young boys, was staying with Fettig. At her request, a social worker removed W from Fettig's residence and put him on a plane to Louisiana.

Later in the fall, Goetzke began telephoning W. He left messages calling W "little brother" and saying that he missed him. AG permitted Goetzke to speak to W one time while she listened on another line. Nothing untoward was said.

Goetzke sent W a letter from Montana in early February 2004, which AG intercepted. It included pictures, taken during W's visit in Montana, of W riding horses and motorcycles. Goetzke asked for a picture of W in the pants he wore while in Montana, and offered to take pictures and send them to W. The letter also told W that

> I don't know if you will understand, but I am gay, meaning I like guys more than I do girls. I hope you won't hate me. I have always wanted to tell you you have a nice butt, but I hope you won't tell anyone because it could get me into trouble, but I trust you to keep it between us.

The letter expressed Goetzke's "wish [that W] could come up here [to Montana] so that we could go horseback riding." Goetzke then wrote that

> I miss wrestling around with you. That was always fun. And giving you a back rub. I miss doing that. I like giving people a back rub, even when they don't have any clothes on. Then I can rub their butt. I hope it ain't bothering you about me talking about sex, being you're young, but I just wanted to tell you that you have a nice butt and am sure a nice peter.

Goetzke expressed his belief that W "was a cute young man." He also wrote about his new video games, telling W that "I got some new games for my Nintendo 64. I've got Turok Rage Wars, Mario Party 3, and Star Wars. I am to the last level...." Goetzke told W that he had gone to see W's grandfather and that "I have known your grandpa since I was your age." He then wrote that "I liked talking to you on the phone, but I miss you even more, and I think about you all the time and wonder how you're doing. I really do hope you will write back. Please. It would mean a lot to me to have you write back." Goetzke signed off with "Love You Little Brother."

AG turned the letter over to the authorities who, posing as W and mimicking his writing style, responded. In March 2004, Goetzke sent a much more sexually explicit letter, which AG again intercepted. In the letter, Goetzke confirmed that "you do have a nice butt." He explained:

> The reason you wake up and your peter is sticking out is because that means you're horny and you are growing into a young man, and in a couple years, you will start to have sex. You know when you were here and I gave you a back rub, I wanted to rub your butt because you have a nice butt, and I wanted to put your peter in my mouth if you would have let me. But the next time your

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> peter gets hard, sticking out, play with it. Put it in your hand and move your hand up and down, and you will like the way it feels. It will tickle. But anytime you don't know why about your body, you tell me, and I will help you understand. I really miss you. If you can, will you send me a picture of you?

Goetzke told W that

> soon school will be out. Are you ever going to come to Montana again? Maybe this summer? It sure would be nice to have you here, as I had a lot of fun when you were here. But if you ever do come to Montana again, would you let me see your butt naked and let me put your peter in my mouth? I would like that. And I hope you will keep writing to me. I like hearing from you and talking to you on the phone. I like the sound of your voice. But please don't tell anyone what we say in our letters. It could get me into a lot of trouble.

Goetzke further explained that, "[w]hen you wake up with your peter sticking out, that is called a hard-on, where your peter is hard and stiff." He then wrote:

> I have rode my horse a couple times on the weekend, and I hope someday you can come to Montana so then we could go riding together and go fishing like we did when you were here and ride my bike. And if you come back to Montana, I would get you a motorcycle of your own. Then we could ride and have fun. But I was real happy to hear from you. Thank you, Little Brother. Is it okay if I call you my little brother? Because I had a lot of fun with you, and I think about you a lot and wish you were here. But I really do think you have a nice butt. And thank you for not being mad at me for saying you have a nice butt, because you really do have a nice butt. And when you get older, people are going to see your butt the same way I do.

Goetzke asked W, "[I]s your peter long or short when it's sticking out?" He then told W that "I have a picture of you in a baseball uniform. I have it at the head of my bed. I wish Ray would have let you sleep upstairs." Goetzke signed off with "Love and miss you. Love always, Dave."

An undercover agent wrote a response for W, to which Goetzke did not reply. The last phone call was in March or April of 2004 when Goetzke called at 1:00 a.m. and AG told him to stop.

On October 26, 2004, a grand jury returned an indictment charging Goetzke with an attempt to persuade a minor to engage in sexual activity in violation of § 2422(b). During the one-day trial, AG testified regarding the phone calls, and an agent read the letters into evidence. Goetzke did not put on a defense. At the close of the evidence, Goetzke moved for an acquittal pursuant to Federal Rule of Criminal Procedure 29. Relying on *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004), the district court denied the motion. The jury convicted Goetzke.

Goetzke's appeal challenges the sufficiency of the evidence. To it, we apply the familiar standard articulated in *Jackson v.* [redacted], 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and ask whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

II

[1] The elements that the government had to prove to convict Goetzke are that he knowingly (1) attempted to (2) persuade, induce, entice, or coerce (3) a person under 18 years of age (4) to engage in sexual

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activity that would constitute a criminal offense.[1] *Meek*, 366 F.3d at 718. The government prosecuted Goetzke for an attempt to persuade, induce, entice, or coerce, rather than actually doing so, because W never received the letters due to his mother's interception of them. An attempt conviction requires evidence that the defendant "intended to violate the statute and took a substantial step toward completing the violation." *Id.* at 720 (internal quotation marks omitted).

A rational juror could well have found that Goetzke knowingly tried to persuade, induce, entice, or coerce W to engage in prohibited sexual activity. He knew that W was underage, and Montana criminalizes oral sex when the victim is younger than 16.[2] Goetzke specifically directed his letters to W. In his letters, Goetzke made advances of a sexual nature—telling W that he was a "cute young man," suggesting an exchange of pictures, describing how he liked giving W a backrub and wanted to rub his "nice butt," advising W how to stimulate himself, and expressing the desire to see W naked and to "put your peter in my mouth." Redolent of the fun they had together riding horses, fishing, and being massaged, the letters were crafted to appeal to W, flatter him, impress him, and encourage him to come back to Montana "maybe this summer" when school was out, by promising the same kind of fun and a motorcycle of W's own. The letters essentially began to "groom" W for a sexual encounter in the event he returned to Montana. *See United States v. Brand*, 467 F.3d 179, 203 (2d Cir.2006) ("'Child sexual abuse is often effectuated following a period of "grooming" and the sexualization of the relationship.'" (quoting Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. Legal Med. 471, 479 (1998))), *cert. denied*, — U.S. —, 127 S.Ct. 2150, 167 L.Ed.2d 878 (2007). Because of the allure of the recreational activities and the prospect of a motorcycle, the letters fit neatly within the common understanding of persuade, induce, or entice.[3] *See United States v. Dhingra*, 371 F.3d 557, 562 (9th Cir.2004) (indicating that these terms are to be given their plain and ordinary meaning). Consequently, the evidence was sufficient to find that Goetzke intended to persuade, induce, entice, or coerce W to engage in unlawful sexual activity.

[2] A rational trier of fact also could find that Goetzke took a substantial step toward completing the crime. "To constitute a substantial step toward the commission of a crime, the defendant's conduct

1. Title 18 U.S.C. § 2422(b) provides:

> 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.

2. Montana Code Annotated section 45–5–503 punishes an individual "who knowingly has sexual intercourse without consent with another." Section 45–5–501(1)(b)(iv) defines "without consent" to mean, "the victim is incapable of consent because the victim is . . . less than 16 years old." Under Montana law, sexual intercourse includes "penetration of the vulva, anus, or mouth of one person by the penis of another person." Mont.Code Ann. § 45–2–101(68)(a).

3. To "persuade" is "to induce by argument, entreaty, or expostulation into some mental position"; to "induce" is "to move and lead (as by persuasion or influence)"; and to "entice" is "to draw on by arousing hope or desire." Webster's Third New International Dictionary 757, 1154, 1687 (unabridged ed.1993).

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must (1) advance the criminal purpose charged, and (2) provide some verification of the existence of that purpose." *Walters v. Maass*, 45 F.3d 1355, 1358–59 (9th Cir. 1995) (internal quotation marks omitted). Goetzke mailed letters to W that flattered him, described the sex acts that Goetzke wanted to perform on him, and encouraged him to return to Montana. Those acts both advanced and verified the existence of Goetzke's purpose to persuade W to engage in sexual activity with him.

Goetzke argues that, because he was not in a position to have physical contact with W—they were thousands of miles apart when he sent W the letters—he cannot be guilty of violating § 2422(b). But Goetzke was charged with attempting to *persuade, induce, entice, or coerce* W to engage in sexual activity with him—not with attempting to *engage* in sexual activity with W. The latter is an attempt to achieve the physical act of sex, for which physical proximity is integral. But the former is an attempt to achieve the mental act of assent, for which physical proximity can be probative but is not required. *See Dhingra*, 371 F.3d at 562 (emphasizing that the statute focuses on the actor and the intent of his actions to persuade, induce, or entice); *Brand*, 467 F.3d at 202 (holding that a conviction under § 2422(b) requires a finding only of an intent to entice, not an intent to perform the sexual act following the persuasion); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir.2004) (stating that the underlying conduct that § 2422(b) criminalizes is the persuasion of the minor, rather than the sexual act itself); *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir.2000) (observing that "Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves").

Similarly, travel by a defendant to meet a potential victim is probative, but not required, to advance and verify an intent to persuade, induce, entice, or coerce. In *Meek*, 366 F.3d at 720, we found the defendant's "extensive[online] sexual dialog, transmission of a sexually-suggestive photograph, repeated sexual references as to what [the defendant] would do when he met the boy, and his travel to meet the minor at a local school" sufficient to evidence his guilt under § 2422(b). *Accord Brand*, 467 F.3d at 202–04 (holding that the defendant's initiating contact, sexual advances, grooming behavior, and sexually explicit conversations provided overwhelming evidence of an attempt to entice, and that his traveling to a prearranged meeting place was a final substantial step); *United States v. Blazek*, 431 F.3d 1104, 1106–07 (8th Cir.) (holding that the jury could find intent to entice a minor based on explicitly sexual talks followed by travel to a prearranged meeting place), *cert. denied*, 547 U.S. 1082, 126 S.Ct. 1800, 164 L.Ed.2d 538 (2006); *United States v. Patten*, 397 F.3d 1100, 1102–03 (8th Cir.2005) (holding that evidence of internet chats, a phone call arranging a meeting, and travel to the prearranged meeting place were sufficient); *United States v. Munro*, 394 F.3d 865, 869 (10th Cir.2005) (holding that the evidence was sufficient where the defendant initiated sexual conversations, tried to entice the victim by representations about his car, house, and money, and went to a prearranged meeting place); *Murrell*, 368 F.3d at 1288 (holding that the evidence was sufficient where the defendant traveled two hours to meet a minor for sex in exchange for money, carrying a teddy bear, cash, and condoms). But nowhere in *Meek* did we hold, or even hint, that physical proximity or travel is *necessary* to constitute a substantial step under § 2422(b).

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[3, 4] To constitute a substantial step, a defendant's "actions must cross the line between preparation and attempt by unequivocally demonstrating that the crime will take place unless interrupted by independent circumstances." *United States v. Nelson*, 66 F.3d 1036, 1042 (9th Cir.1995) (internal quotation marks omitted). We agree with the Third, Sixth, and Tenth Circuits that, when a defendant initiates conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward persuading, inducing, enticing, or coercing a minor to engage in unlawful sexual activity. *See United States v. Tykarsky*, 446 F.3d 458, 469 (3d Cir.2006) (concluding that instant messages arranging a meeting and appearing at the prearranged meeting place each provided sufficient evidence of a substantial step toward persuading or inducing a minor); *United States v. Thomas*, 410 F.3d 1235, 1245–46 (10th Cir.2005) (holding that the defendant's initiation of sexual conversation, writing insistent messages, and attempting to make arrangements to meet were a substantial step); *Bailey*, 228 F.3d at 639–40 (holding that the defendant's attempts to schedule meetings with minors constituted a substantial step). Unlike a bank robber who has yet to move toward a bank,[4] such a defendant will succeed in his persuasion, inducement, enticement, or coercion, unless interrupted by the fortuitousness of a circumstance independent from him, such as intercession by a parent or law enforcement officer (as happened here), or refusal by the minor.

Goetzke did more than merely think about sexual activity with a minor or reduce his thoughts to a diary. He sent W letters replete with compliments, efforts to impress, affectionate emotion, sexual advances, and dazzling incentives to return to Montana, and proposed that W return during the upcoming summer.[5] In short, Goetzke made his move. Indeed, given their prior relationship and what Goetzke knew of W and their circumstances, the most substantial steps he realistically could take were to communicate his affections and carefully-crafted incentives to W by telephone and mail, which he did. Accordingly, a rational juror could conclude beyond a reasonable doubt that Goetzke intended, and advanced and verified his intention, to persuade, induce, entice, or coerce W to engage in unlawful sexual activity.

AFFIRMED.

4. In *United States v. Buffington*, 815 F.2d 1292, 1303 (9th Cir.1987), we held that the evidence of an attempted bank robbery was insufficient to constitute a substantial step because the defendants did "not take a single step toward the bank, they displayed no weapons and no indication that they were about to make an entry." Here, of course, the crime is persuasion, inducement, enticement, or coercion—not performing a physical act. Even so, analogically, the "movement" toward completing the crime was Goetzke's mailing the letters *to W.*

5. Because Goetzke's letters proposed that W return to Montana, we need not decide whether an attempt to arrange a meeting is required to constitute a substantial step under § 2422(b).

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