No. 16-16482-AA

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DANE GILLIS,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 6:15-CR-226-ORL-41GJK-1

BRIEF OF THE UNITED STATES

W. STEPHEN MULDROW
Acting United States Attorney

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division

MICHELLE THRESHER TAYLOR
Assistant United States Attorney
Appellate Division
Florida Bar No. 529346
400 N. Tampa St., Ste. 3200
Tampa, FL 33602
(813) 274-6000

September 1, 2017

United States v. Dane Gillis
No. 16-16482-AA

Certificate of Interested Persons and Corporate Disclosure Statement

In addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement in Dane Gillis's principal brief, the following persons have an interest in the outcome of this case:

1. Gershow, Holly L., Assistant United States Attorney;
2. Muldrow, W. Stephen, Acting United States Attorney; and
3. Thresher Taylor, Michelle, Assistant United States Attorney.

No publicly traded company or corporation has an interest in the outcome of this appeal.

Statement Regarding Oral Argument

The United States does not request oral argument.

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Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Middle District of Florida in a criminal case. That court had jurisdiction. *See* 18 U.S.C. § 3231. The court entered the judgment against Dane Gillis on September 22, 2016, Doc. 139, and Gillis timely filed a notice of appeal on October 5, 2016, Doc. 142. *See* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291.

Statement of the Issues

I. Did sufficient evidence support the jury's finding that Gillis had attempted to persuade, induce, entice, or coerce a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b)?

II. Did the district court correctly reject Gillis's claim that he could not be convicted under 18 U.S.C. § 373 based on his solicitation of kidnapping?

III. Did the district court abuse its discretion or violate Gillis's constitutional rights by refusing to permit Gillis to present testimony from his proffered experts on certain issues (and would any error be harmless in any event because of the overwhelming evidence of Gillis's guilt)?

Statement of the Case

After an undercover agent posing as the father of an 11-year-old girl responded to Gillis's Craigslist ad, Gillis messaged the agent and described in explicit terms the sexual activities that he wanted to engage in with the child. Gillis also sought the agent's help in a plot to kidnap and rape Gillis's coworker, M.O. He told the agent that they would need to grab her at 4:30 a.m., that they had to hood or blindfold her, and that after they kidnapped her, they could make her "service" the 11-year-old girl. Agents arrested him after he drove to a planned meeting with the agent who had posed as the father. Gillis admitted that he had gone there to have sex with the "little girl." An

investigation showed that Gillis had been looking for months for someone to help him kidnap and rape M.O. and that Gillis had even posed as M.O. online, sharing her picture and making it appear that she wanted to engage in a "rape roleplay" while her husband was out of town.

In this direct criminal appeal, Gillis argues that (1) insufficient evidence supported the jury's finding that he had attempted to induce a minor to engage in sexual activity; (2) because the crime of kidnapping hypothetically could be committed in non-violent ways, his conviction for soliciting a crime of violence should be set aside; and (3) the district court violated his Fifth and Sixth Amendment rights to present a defense by refusing to permit him to present testimony by his proffered experts on certain issues.

Course of Proceedings

A grand jury returned a superseding indictment charging Gillis with violating 18 U.S.C. § 2422(b) by attempting to induce a minor to engage in sexual activity (count one), violating 18 U.S.C. § 373 by soliciting a crime of violence (kidnapping by "seizing, confining, kidnapping, abducting, and carrying away" in violation of 18 U.S.C. § 1201(a)) (count two), and violating 18 U.S.C. § 875(c) by transmitting a true threat to kidnap and injure (count three). Doc. 28.

Before trial, Gillis notified the United States that he wished to present

expert testimony by James Herriot and Susan Sullivan on certain issues, but the United States moved to exclude their testimony. Docs. 52, 61. After holding hearings, Docs. 147, 148, and hearing argument at the final pretrial conference, Doc. 149, the district court granted in part the motion to exclude Herriot's testimony, Doc. 83, and granted the motion to exclude Sullivan's testimony, Doc. 150 at 7–8.

At the close of the United States' case, Gillis moved for a judgment of acquittal on all three counts, Doc. 152 at 294, and he renewed that motion after presenting evidence in defense, Doc. 153 at 280–81. The court denied those motions. Doc. 153 at 14, 281. The jury found him guilty as charged. Doc. 111. The district court imposed a total sentence of 360 months in prison (360 months on count one, 240 months on count two, and 60 months on count three, all terms concurrent). Doc. 139 at 2. This appeal followed. Doc. 142.

Statement of the Facts

A. Gillis's Crimes

In 2015, Gillis posted a Craigslist ad seeking "the right sadistic Pervert" to engage in "extremely taboo scenes," with "[h]i risk and reward." Doc. 151 at 41; Gov't Ex. 1. Gillis's ad caught the eye of Special Agent Rodney Hyre, who was working undercover for the FBI's Violent Crimes Against Children Task Force. Doc. 151 at 31–36, 44. Agent Hyre responded to the ad, posing as

the father of an 11-year-old girl.[1] (9/1, 8:36 a.m.). Doc. 151 at 44. About an hour later, Gillis wrote back, "Tell me more … i know a 40 yo that needs to be schooled." (9/1, 9:43 a.m.). A few minutes later, Gillis sent a picture of his coworker M.O. (the intended victim of Gillis's kidnapping plot), along with a message asking, "Any pics?" (9/1, 9:49 a.m.).

Agent Hyre wrote that he and his daughter enjoy "playing together" and asked if Gillis were interested in that. (9/1, 10:04 a.m.). Agent Hyre sent Gillis a photograph (an old picture of a law enforcement officer when she was 12 or 13), and wrote, "sweet for 11. don't you think." (9/1, 10:07 a.m.).

Gillis asked, "She's 11?" (9/1, 11:47 a.m.). When Agent Hyre confirmed that, Gillis wrote, "Cute … anything better?" *Id.* Two days later, Gillis asked, "So do you have bdsm experience and equipment? And are you willing to use an unwilling cunt ..." (9/3, 3:34 p.m.).[2] The next day, Gillis wrote, "i didn't get a reply ro my proposition." (9/4, 2:01 p.m.). The agent answered, "[U]nwilling cunt? talking about my 11yo or do you have one." (9/4, 2:13 p.m.).

Gillis wrote, "do yo u have a place we can take her? love to meet your

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[1]The Craigslist messages are Gov't Ex. 2; Gov't Ex. 31 is a shorter, more readable summary. We cite to the messages using the original spelling, with the date and time in parentheses.

[2] BDSM is an acronym for "bondage, discipline, sadomasochism." Doc. 153 at 191.

girl too?" (9/4, 2:15 p.m.). The agent asked if Gillis was asking about a place to take his daughter, but Gillis responded, "no not take your daughter … the 40 yo milf[3] i talked to you about … i sent you a pic of her last email…looking to snag her and use her as a sex slave for as long as you want … still like to meet your girl though too." (9/4, 2:27 p.m.). A few minutes later, Gillis wrote, "so when can i meet your girl?" (9/4, 2:36 p.m.).

Gillis proposed, "What if we grab the milf and make service your girl." (9/4, 3:10 p.m.). Gillis asked where they lived, and after the agent responded that they lived in the Lake Mary area, Gillis said that he lived in Leesburg and "would love an invite …." (9/5, 6:28 p.m.). Responding to the agent's question of what Gillis wanted the woman to do to the girl, Gillis wrote, "Well anything you like … remember if you want that tp happen wr need to grab her … she is unwilling and unknowing … but she is a juicy milf." (9/5, 6:31 p.m.). The agent asked if they would have to "force her," and Gillis wrote that, "she has to be grabbed early am … likev4:30" and they would need "manpower." (9/5, 10:29 p.m.).

Two days later, Gillis wrote, "So what do you think?" (9/7, 1:33 p.m.). He attached a picture of himself on a motorcycle. *Id.* The agent wrote, "so if I understand you right you want me and you to kidnap a chic and rape her."

[3]"MILF" is an acronym for "Mother I'd like to fuck." Doc. 151 at 52.

(9/8, 7:58 a.m.). The agent asked how they would avoid getting arrested and how well Gillis knew the intended victim. *Id.* The agent also asked, "[A]re you interested in my 11 yo girl or just older?" *Id.*

Gillis answered, "Right now im only interested in your 11 yo … the other we can talk about." (9/8, 4:34 p.m.). Within minutes, Gillis sent two messages that said only, "Asap." (9/8, 4:35 p.m., 4:38 p.m.).

The agent wrote, "let me know what you want to do." (9/9, 6:39 a.m.). Gillis wrote, "What will she do? Im flexible." (9/9, 7:54 a.m.). The agent said she would do whatever Gillis said, then asked what Gillis wanted to do with her. (9/9, 8:27 a.m.). Gillis asked, "What r your limitations and conditions?" (9/9, 10:40 a.m.). Gillis wrote that he wanted, "A little of everything … Play with her .. eat her little pussy .. have her suck me … penetration etc…" (9/9, 11:11 a.m.). Doc. 152 at 127–28.

Gillis asked, "when can we do this …?" (9/9, 11:12 a.m.). The agent said he would pick up his daughter from school at about 2 p.m. (9/9, 11:14 a.m.). After a few more messages, Gillis asked, "what about tonite?" (9/9, 1:35 p.m.). Later, Gillis asked if they could meet "tomorrow night?" (9/9, 4:13 p.m.).

The agent responded "probably" and asked if Gillis was "interested in the 11yo right?" (9/9, 4:15 p.m.). Gillis asked, "what else is there?" (9/9, 4:43

p.m.). The agent wrote that Gillis had previously asked about "grabbing some chic," then asked again what Gillis wanted to do with the 11-year-old. (9/9, 4:58 p.m.). Gillis said, "In a previous email i said we could talk about her … i want to 'play' with your young one … how does tomorrow night work for you?" (9/9, 6:19 p.m.).

The agent wrote back the next day and said "tonight could work" but "I have to be allowed to watch you 'play' cool?" (9/10, 6:39 a.m.). Gillis said that he was "[n]ot good with an audience … but your rule so … what time?" (9/10, 7:46 a.m.). Gillis suggested meeting at 6 p.m. and asked "do you dress her in any special outfits?" (9/10, 8:30 a.m.).

Around lunchtime, the agent wrote, "so you want to do this tonight? or not? up to you." (9/10, 12:22 p.m.). Gillis asked for the address where they should meet. (9/10, 3:06 p.m., 3:26 p.m.). The agent suggested that they meet at the Gander Mountain store parking lot in Lake Mary "then go visit my lil girl"; he provided the address. (9/10, 3:09 p.m., 3:29 p.m.).

Later that day, Gillis wrote, "Sorry im not goibg to make it. Kinda wiggin on the whole deal. Sirry." (9/10, 4:39 p.m.). The agent wrote, "later," (9/10, 4:41 p.m.), then the next morning asked Gillis what had happened, (9/11, 7:59 a.m.). Gillis wrote, "i emailed you to say i was going to pass for now .." (9/11, 12:22 p.m.). The agent wrote back, "oh that's cool. sorry to

hear that but I understand." (9/11, 1:39 p.m.). The agent wrote, "if u ever want to go for either mine lil one or the other chic let me know id be down with it." (9/11, 1:46 p.m.).

Just over an hour later, Gillis wrote, "Do u have any friends thatvwould interested in the milf? Need help … a van … and a place to take her … etc…someone with experience?" (9/11, 2:58 p.m.). The agent asked who the woman was and how Gillis knew her, and Gillis said that he works with her and sent several more photos. (9/11, 4:14 p.m., 4:16 p.m.).

The agent asked what Gillis wanted him to do, "and how do u know she wont tell the cops." (9/11, 4:20 p.m.). Gillis wrote, "Help in any way … like said before … do you know anyone who would help … a place to keep her for at least 24 hours … someone with experience would be helpful … and uou on whoever work every hole and general bdsm shit… shes a goody 2 shoes flirt that NEEDS to be taught a lesson. Im open to any 'ending' scenario when it cums to her." (9/11, 5:06 p.m.); *see also* Doc. 151 at 80.

A few minutes later, Gillis added, "We have to hood andvor blindfold her from the beginning. We wear masks too." (9/11, 5:08 p.m.). Gillis described the victim as "[t]he type of privaledged whorevyou eill enjoy fucking up." (9/11, 7:40 p.m.).

The agent asked, "why don't we meet and do what you said with my

little one and then we can plan the big surprise." (9/11, 8:18 p.m.). The agent later wrote that he was worried about why Gillis had cancelled and asked "are u still interested and just want both"? (9/14, 8:44 a.m.). Gillis responded that he had been "nervous," had "[n]ever been with a young one," and wanted to make sure that he was "not being set up." (9/14, 9:06 a.m., 9:44 a.m., 9:45 a.m.).

Gillis suggested, "Maybe just you and should meet first." (9/14, 1:18 p.m.). The agent agreed and said that once they met to "show we are real" they could go back to meet the girl. (9/14, 1:20 p.m.).

Gillis wrote, "We can met anytime .. when will you be getting her again?" (9/14, 1:22 p.m.). Gillis asked numerous times for more pictures of the girl. (9/14, 7:09 p.m.; 9/15, 8:26 a.m., 4:03 p.m., 5:50 p.m.; 9/16, 10:15 a.m., 10:39 a.m., 10:45 a.m.). The agent finally sent another photograph of the same law enforcement officer as a child, wearing a white top, and Gillis commented that she looked "older then 11," then wrote, "Looks she has some tasty little titties…is she still all smooth down below?" (9/16, 11:17 a.m., 12:30 p.m.). Gillis asked, "What would be a good time?" (9/16, 12:30 p.m.). They arranged to meet at the Gander Mountain parking lot at 4 p.m. on September 16, 2015. The agent asked Gillis what he wanted the 11-year-old to wear, and Gillis wrote, "How bout a shot skirt no underwear." (9/16, 3:05 p.m.).

That afternoon Gillis drove about one hour from his home in Leesburg, Florida, to the Gander Mountain parking lot. Doc. 151 at 38; Doc. 152 at 18. Another agent posed as the 11-year-old's father. Doc. 152 at 138, 146. Gillis flashed his headlights, and the agent posing as the father tapped his brake lights. *Id*. at 140–41. After confirming Gillis's identity, the agent asked him, "Do you want to go to the house?" and Gillis answered, "Sure." *Id.* at 141–42. The agents then arrested Gillis. *Id*. at 143.

FBI agents interviewed Gillis and he admitted that he had been communicating with the father of an 11-year-old girl and that he was there to "have sex with the little girl." Doc. 152 at 17–18. He "specifically … affirmed that he wanted to engage in oral sex, vaginal sex and digital penetration with the little girl." Doc. 152 at 129; *see also id.* at 17–18. He admitted that "for approximately the last two years he … ha[d] fantasized about having sex with children" and found that "titillating." Doc. 152 at 18–19. He admitted that he had first thought of having sex with a child a couple of years earlier when the subject had come up in an online conversation. Doc. 152 at 121; *see also id*. at 118. He admitted that he had cancelled the earlier meeting because he had "thought it was a police sting operation." *Id.* at 19. He admitted that "for the previous few days" he "had masturbated to thoughts of meeting [the] eleven-year-old and having sex with her." *Id.* at 20.

Regarding the plot to kidnap M.O., Gillis at first lied to agents by providing a false name for the victim and claiming that she had stolen money from him and broken his heart. Doc. 152 at 20–21. But the agents could see the victim's real name embroidered on her chef jacket in one of the photographs that Gillis had in his e-mail account, and, after confronting Gillis with the victim's true name, he finally admitted that (in the agent's words), M.O. was "the person he's been … talking about kidnapping and raping and possibly killing." Doc. 152 at 21–22. He said that they were coworkers and had no romantic relationship, but when she had told him two weeks before that she was going to another restaurant, "this made him angry, and … this is how he handled being rebuked by women." Doc. 152 at 22. He also admitted that he had talked to between "ten and twenty" other people about the plan to kidnap and rape M.O. Doc. 152 at 22–23.

An investigation revealed that Gillis had been trying for months to find someone to help him kidnap and rape M.O. *See* Gov't Exs. 21–25, 28–29. Without M.O.'s knowledge, Gillis had sent photographs of M.O. to numerous Craigslist users across the country between February and August 2015. Doc.152 at 100, 263–64, 284–85; Gov't Exs. 21–25, 28–29. (Indeed, at trial, he admitted to sending out "80-some pictures" of M.O. Doc. 153 at 255.) In some messages, he told would-be rapists the town where she lived and the time that

she left for work (4:30 a.m.). Doc. 152 at 101, 249; Gov't Exs. 23, 25.

For instance, in early February 2015, Gillis sent a photograph of M.O. to a Craigslist user and wrote, "Need a 'dungeon'/place. Do u have friends.? Abduction…sexual torture…I have one pic of her…40 yo milf…very pretty." Gov't Ex. 24. He wrote, "Looking to do almost anything to fuck this bitch up sexually…looking forvlots of bdsm toys…dildos…plugs…nipple clamps etc….andb lots of big dicks and cum in her…on her..and in her belly…anal fisting…open to suggestions." Gov't Ex. 24. Gillis wrote, "Need manpower and a van would be nice. I know her schedule and snagging her when shes leaving her house for work at like 4:30 a.m. Should tske her car somewhere." Gov't Ex. 24.

In March 2015, he sent M.O.'s picture to someone else and wrote, "Are u interested in an UNWILLING cunt that can be used as hard as u can. Only limits are blood…lasting marks…" Gov't Ex. 25. Gillis wrote that M.O. worked with him and was an "uppity…stuck up goody 2 shoes cunt that needs a lesson." *Id*. He wrote, "Need a couple guys willing to help snag her. A van would be nice. She leaves her place around 4:30 a.m….pretty quiet and some good cover." *Id*. He also sent similar messages to other users in May and August 2015. Gov't Exs. 23, 29.

Gillis learned that in mid-May, M.O.'s husband was leaving for a trip

and would be gone for about a week and a half. Doc. 152 at 252. So he went online, assumed M.O.'s identity, and messaged several people, trying to convince them that M.O. wanted to engage in a "rape roleplay" while her husband was away. Gov't Exs. 21, 22, 23. He wrote, "42 yo milf for force d rape roleplay. Interested. I live in mt dora and mg hubby leaves thisxweekend for 10 days," attaching a picture of M.O. and her husband that Gillis had cropped to remove half of the husband's face. Gov't Ex. 22 (5/12/15); Doc. 152 at 130. The same day, he messaged someone else, "Would you be into the entire scene including 'kidnapping' me. Want it very real with little or no bound[a]ries …?" Gov't Ex. 21. He wrote, "Will you have help. It will be needed[.]" Gov't Ex. 21. He asked another person, "So you willing to cum take me?" Gov't Ex. 23.

In September 2015, during the timeframe when he was messaging with the undercover agent, Gillis had searched for the terms "kidnapped," "rape kidnap," and "Kidnapped MILF Gets Her Ass Punished." Doc. 152 at 223, 226–27; Gov't Ex. 18. On the morning of his arrest, Gillis used his phone to search the web for "how to rape." Gov't Ex. 18.

An agent who examined Gillis's computer found sexually suggestive photographs of prepubescent girls. Doc. 152 at 191–93, 242.[4] Gillis had

[4]These exhibits (Gov't Exs. 4–9) were admitted at trial but are under

conducted internet searches between 2011 and 2015 looking for sexual photographs of young girls. Doc. 152 at 205, 209. These searches included, for instance, "young preteen ass pussy pics," "preteen bondage pics," "preteen playing with a cock," and "preteen dildo pics." Gov't Ex. 11; Doc. 152 at 205–10.

B. Pretrial Rulings on Gillis's Proposed Expert Testimony

Before trial, Gillis provided notice that he wished to present the testimony of James Herriot, Ph.D., as an "expert on sexual communication and behavior on the internet." Doc. 52-1 at 1. Gillis asserted that Herriot is a "Professor of Clinical Sexuality at the Institute for the Advanced Study of Human Sexuality in San Francisco and a certified clinical sexologist" who had written his thesis on "sexual communications on the internet." Doc. 52-1 at 1. Gillis asserted that Herriot would testify about (1) "how the internet works and how people communicate and socialize on the internet"; and (2) the "distinct culture" that exists on the internet in which people engage in fantasy roleplay for entertainment. Doc. 52-1 at 1-2.

The United States moved to exclude Herriot's testimony under Federal

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seal. At sentencing, a psychologist who had reviewed the images described them as showing "prepubescent children" in "underwear or "lingerie," some with "their panties partially moved to almost show their vaginas," or "nude" but with "their hands over their chest." Doc. 155 at 39.

Rules of Evidence 401–03, 702, and 704(b), as not reliable, as not relevant or helpful to the jury, and as inadmissible testimony about Gillis's mental state. Doc. 52.

At a *Daubert* hearing, Herriot testified that although he had served on the faculty of the institute since obtaining his Ph.D. in 1996, his position was unpaid, he taught no classes, he had no office there, and his role was to "advise graduate students, when needed." Doc. 147 at 57–58, 77.[5] He testified that his 1996 dissertation had involved sexual communication on the internet, but it had involved a study of a particular newsgroup (Alt.sexnewsgroup) that used asynchronous communication, not real-time communication. Doc. 147 at 59, 70–71. The dissertation had not been published in any academic journal. *Id*. at 69.

Herriot testified that, in the late 1990s and early 2000s, he had studied chat rooms and had conducted interviews to update his dissertation research in an interactive medium (but could not recall the names of those chat rooms). *Id*. at 73–75. Herriot testified that he had not published any papers germane to his Ph.D. from the time he had become associated with the school until the time of the hearing. *Id*. at 90. He published a book—"9 Secrets to Bedroom Bliss"—

[5]Doc. 147 is a transcript of the April 11, 2016, *Daubert* hearing. Doc. 54 is transcript of Herriot's testimony at that hearing, corresponding to Doc. 147 at 56–97.

but acknowledged that the book had nothing to do with internet culture. *Id.* at 83–84. He had not conducted any studies involving Craigslist. *Id.* at 81.

He testified that he and his colleagues see "a combination of fact and fiction" on the internet and that "people act very differently from their normal, everyday worldly persona." *Id.* at 65. Asked about his opinion, he testified:

> Well, there's no single opinion. It's a complex subject. It's—it's more complex than the layperson would necessarily understand. And it's complex because it's a combination of fact and fiction. There's a certain amount of deception, and there's even a whole 'nother layer here people who participate in this aren't necessarily deceived by the deception.

Id. at 85. But he testified that he was "not a psychologist" so he could not "look inside of anyone's mind" and could not testify about Gillis's motives. *Id.* at 91.

Asked about what academic materials he had relied on to form his opinion, Herriot referred to three authors but was unsure of the details. He testified that he had read at least one article by John Seuler ("I could be wrong, but that's my memory of how [his name is spelled.]") on the online disinhibition effect. Doc. 147 at 93–94. But he could not recall the title of the article. *Id.* at 94. He said that he also had read an article by Michelle Drouin ("Probably it's D-r-o-u-i-n. … She's a professor. I believe—I could be wrong about this, but I believe she was at Indiana University") and the article was

"something to the effect of deception or how we lie in the Internet, something like that." Doc. 147 at 95. He also mentioned a paper by Robin Lincoln, "something to do with No One Knows You're a Dog on the Internet, which is obviously a reference to a New Yorker cartoon." Doc. 147 at 95. He could not recall the names of other academics on whose work he had relied. Doc. 147 at 96–97.

The district court granted in part the United States' *Daubert* motion. The court ruled that Herriot could testify "as to how the internet works generally and how people are able to communicate over the internet using various mediums" but refused to permit Herriot to testify about the "internet sub-culture for fantasy role-playing and sexual communications." Doc. 83 at 4. The court noted that his interviews had taken place in the 1990s or early 2000s, that he had provided "little information" regarding his interviews and studies, and that "these studies occurred nearly two decades ago, through a medium different than the medium at issue in this case …." *Id.* at 7. The court also was concerned that Herriot's findings had not been peer reviewed or published. *Id.* at 8. Finally, the court was concerned that Herriot's findings appeared to require him to "apply principles of psychology," which he had admitted he was not trained to do. *Id.* The court determined that Gillis had not "presented any evidence that Dr. Herriot's studies are based on reliable data or methods,

that Dr. Herriot is qualified to apply the proper principles to the data to reach a reliable result, or that the studies have produced reliable results." *Id*. Moreover, the court found that, to the extent that Herriot based his opinions on academic literature, he had "failed to sufficiently identify that literature." *Id*. The court thus ruled that Gillis had failed to demonstrate that Herriot's testimony was "the result of sound scientific methods and reasoning." *Id.*

The court also ruled that to the extent that Herriot relied on his experience, his "experience is not sufficient to meet the reliability threshold." *Id.* at 9. The court noted that although Herriot purports to be a "full professor" of "[c]linical [s]exuality," Herriot had not explained how that field related to sexual communications on the internet; furthermore, his position was unpaid, he had no office at the institute, and he did not teach classes there. *Id.* The court observed that Herriot's "Bedroom Bliss" book was irrelevant and Gillis had not shown that Herriot had "any specific work or lecturing experience relevant to the expertise on which" he intended to testify as an expert. *Id*. Thus, the court ruled that Gillis had "not met his burden of establishing that Dr. Herriot is either qualified in this field or that he has sufficient experience to render his opinions on online sexual communications reliable." *Id.* at 10.

The district court also ruled that it appeared the gist of Herriot's testimony was "that some information that people communicate to others on

the internet is false and some is true, or at least a variation of the truth," but that that was already within the common knowledge of laypersons: "Jurors do not need expert testimony to determine that people's truthfulness varies when communicating anonymously over the internet." *Id*. The court noted that it might assist jurors to have expert guidance in distinguishing between fictional and nonfictional communications online, but that Herriot "has not purported to have such expertise," and general testimony that "sometimes people engage in fantasy role-play, without more, will not assist the jury in determining if that is what [Gillis] was doing in this case." *Id.* at 10–11.

Shortly after the *Daubert* hearing, Gillis informed the prosecutor that he wished to present expert testimony by Susan Sullivan, Ph.D., who had conducted a "psychosexual evaluation of Mr. Gillis." Doc. 61-1 at 1. Gillis notified the prosecutor that Sullivan would "testify how her psychosexual evaluation of Mr. Gillis provides insight into his sexual interests and how Mr. Gillis expresses his sexuality" in order to "help the jury understand who Mr. Gillis is aside and apart from his alleged criminal conduct." Doc. 61-1 at 2.

Gillis's counsel proffered that Sullivan's opinion would be that Gillis had "no persistent attraction to children." Doc. 149 at 10; *see also* Doc. 150 at 7.[6]

[6]At sentencing, Sullivan testified that Gillis's scores on an assessment of sexual interest test "did not reflect a sexual attraction to prepubescent children," but that he did show "significant interest in female adolescents age

Gillis's counsel argued that Sullivan's testimony about Gillis's "general sexual development" was relevant because Gillis's "angry fantasies" had resulted from his "stunted sexual development." Doc. 149 at 9–10; *see also* Doc. 150 at 7–8.

The United States argued that, under Federal Rule of Evidence 704(b), an expert could not opine on Gillis's mental state, and expressed concern that Gillis was trying to use Sullivan as a mouthpiece to get his own statements before the jury without having to take the stand himself. Doc. 149 at 8. The court observed that Gillis's statements permeated Sullivan's report of the psychosexual evaluation: "'Mr. Gillis reported.' 'Mr. Gillis reported.' 'Mr. Gillis reported.' 'Mr. Gillis reported.' 'Mr. Gillis talked.' 'Mr. Gillis said.'" Doc. 149 at 13.

On the morning of trial, the district court granted the United States' motion in limine and refused to permit Sullivan to testify that Gillis was "not attracted to prepubescent females" or on "how Mr. Gillis expresses his sexuality," ruling that "this testimony would be Dr. Sullivan relaying what [Gillis had] told her during previous interviews on a topic that the Court deems irrelevant." Doc. 150 at 8. The court said, "It seems clear that the real purpose here is to present opinion testimony from an expert concluding that the

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14 to 17." Doc. 155 at 14, 23.

defendant did not have the requisite intent to commit the offense because the defendant … just isn't attracted to prepubescent females." Doc. 150 at 8.

C. Trial

At trial, Agent Hyre testified about his online conversations with Gillis and Gillis's attempts to solicit others to rape or kidnap M.O. Doc. 151 at 31–103; Doc. 152 at 12–132. The agent who had posed as the 11-year-old's father at the time of Gillis's arrest also testified. Doc. 152 at 138–39. An agent testified about the images and the internet searches she had discovered when she had examined Gillis's cellphone and computer. Doc. 152 at 185–242. M.O. testified that she and Gillis had worked together in a resort kitchen since 2014, that she and her husband had gone to Gillis's house for dinner in the fall of 2014 (which is where Gillis took one of the pictures of M.O. that he later sent out in furtherance of his kidnapping plot), and that she had considered him her friend until he began "crossing lines" around the spring of 2015. Doc. 152 at 247–48, 262–63, 278. M.O. testified that she ultimately had decided to request a transfer to another restaurant, in part to avoid Gillis, but when she told this to Gillis in late August, he slammed his fist on the table, cursed at her, and said, "This isn't going to happen." Doc. 152 at 273–74.

Gillis called several witnesses in his defense; he also testified himself. He admitted messaging the undercover agent, but claimed that he had "assumed

an online persona that pertained to fantasy role-play." Doc. 153 at 191. He testified that he was "lonely" and the roleplay was "the only way at the time that [he] was able to express [him]self sexually." Doc. 153 at 192. He testified that, when he was in high school, he had had surgery to remove his "man boobs," and that this surgery had left his chest deformed and had caused him to develop a "horrible body image" that hampered his ability to develop intimate relationships. Doc. 153 at 163. He testified that he did not have an intimate relationship until he was 28. Doc. 153 at 162–63.

Gillis testified that he was impotent and not sexually interested in children. *Id*. at 194–95. He admitted driving to Gander Mountain but claimed that he only went there to have a conversation and denied wanting to have sex with the child. Doc. 153 at 200–01, 212, 217. He testified that, when he sent the message describing in explicit terms the sexual acts that he had wanted to engage in with the child, he was only roleplaying. *Id*. at 214, 223. He denied having told Agent Hyre that he had fantasized about having sex with children. *Id*. at 207, 215. He claimed that he had only engaged in conversation about the child because he had wanted to "stimulate the conversation about the MILF." *Id*. at 217. He testified, "I never thought about having sex with a child before," but he admitted that between 2011 and 2015 he had searched the internet using terms like "preteen hard core pics," "preteen anal pics," and "preteen bondage

pics." *Id.* at 225.

Gillis testified that the plot to kidnap M.O. was "pure fantasy," Doc. 153 at 233, but he admitted that he knew her actual work schedule and that he had told people that she left for work at 4:30 a.m. Doc. 153 at 229–30. He also admitted to posing as M.O. online in May 2015—at a time when he knew that her husband would be out of town for ten days—in order to convince others that she wanted to be kidnapped and raped. Doc. 153 at 249–50.

In moving for a judgment of acquittal, Gillis argued that he could not be convicted of the 18 U.S.C. § 373 violation because he was charged with soliciting the crime of kidnapping, which he contended was not a crime of violence because it could be committed without the use, attempted use, or threatened use of physical force. Doc. 152 at 295–301; *see also* Doc. 153 at 281–82, 318–19.

The prosecutor argued that all of the forms of kidnapping charged in the indictment required the use, threatened use, or attempted use of physical force. *Id.* The prosecutor noted that the indictment did not charge solicitation of a kidnapping by inveiglement or decoy. *Id.* at 309. The prosecutor also argued that Gillis's reliance on ACCA decisions was misplaced because section 373 focuses on the defendant's conduct, not the elements of some prior conviction. Doc. 153 at 14.

The district court denied the motion for judgment of acquittal, noting that Gillis was trying to expand the Supreme Court's law under the ACCA to a different context, and that Gillis's interpretation would "gut" the federal solicitation statute. Doc. 153 at 11, 14.

During the charge conference, Gillis argued that the court should not instruct the jury that kidnapping "has as an element the use, attempted use, or threatened use of physical force against the person of another." Doc. 153 at 292. He argued that the jury had to make that finding. *Id.* at 293. The prosecutor disagreed, arguing that the instruction was "an issue of law for the Court to instruct the jury on." *Id.* The court sided with the United States. *See* Doc. 110 at 17–18.

Gillis also objected to the proposed kidnapping instruction because it listed only certain of the statutory alternatives—"kidnap, seize, confine, abduct, or carry away"—and omitted other forms of kidnapping in the statute ("inveigles" and "decoys"). Doc. 153 at 294. The court explained that the jury instruction matched the forms of kidnapping charged in the indictment, *see* Doc. 28 at 2, but asked, "So you want me to add the words that they haven't charged in their Indictment?" Doc. 153 at 195. Gillis then withdrew that request. *Id.*

After instructing the jury on the crime of solicitation to commit a crime

of violence, Doc. 110 at 17–18, the court then instructed the jury that the crime of kidnapping required proof that the defendant "knowingly and willfully kidnapped, seized, confined, abducted, or carried away the victim," *id.* at 18. In line with the pattern jury instruction on kidnapping, the district court further instructed the jury that "[t]o 'kidnap' a person means to forcibly and unlawfully hold, keep, detain, and confine that person against the person's will. Involuntariness or coercion related to taking and keeping the victim is an essential part of the crime." *Id*.

On the verdict form, the jury marked that it had found Gillis guilty of "soliciting, commanding, or endeavoring to persuade another to commit the crime of kidnapping." Doc. 111 at 1.

Standard of Review

I. This Court reviews de novo the sufficiency of the evidence supporting the jury's verdict, viewing the evidence "in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *United States v. Ortiz*, 318 F.3d 1030, 1036 (11th Cir. 2003).

II. Whether the kidnapping that Gillis solicited here qualifies as a crime of violence under 18 U.S.C. § 373 is a question of law that this Court should review de novo. *Cf. United States v. McGuire*, 706 F.3d 1333, 1337 (11th

Cir. 2013) (evaluating whether offense was crime of violence under 18 U.S.C. § 924(c)).

III. This Court reviews for abuse of discretion a district court's ruling on the admissibility of expert testimony. *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc).

Summary of the Argument

I. The evidence was sufficient to support Gillis's conviction for attempting to induce a minor to engage in sexual activity. Gillis's messages describing in explicit terms which sexual activities he wished to engage in with the 11-year-old, his driving about an hour to the planned meeting, and his post-arrest admissions demonstrate that he had the requisite criminal intent and that he had taken a substantial step toward completing the offense.

II. The district court correctly rejected Gillis's claim that he could not be convicted under 18 U.S.C. § 373 for soliciting the crime of kidnapping. Although Gillis contends that a kidnapping hypothetically could be committed in a non-violent way, Gillis is incorrect that his actual conduct doesn't matter; to the contrary, section 373 expressly focuses on the "conduct" that the defendant is soliciting. But even if this Court were to extend the categorical approach to this context, the jury's verdict establishes that Gillis had solicited a form of kidnapping that has as an element the use, attempted use, or

threatened use of physical force.

III. The district court did not abuse its discretion or violate Gillis's right to present a defense by refusing to allow him to elicit expert testimony on certain issues. Regardless, any error in not allowing Gillis to present that expert testimony would be harmless beyond a reasonable doubt given the overwhelming evidence of his guilt.

Argument and Citations of Authority

I. Overwhelming evidence supports the jury's finding that Gillis attempted to persuade, induce, entice, or coerce a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b).

Gillis argues that the evidence was insufficient to convict him of attempting to entice a minor into illegal sexual activity in violation of 18 U.S.C. § 2422(b). Gillis's brief at 26–33. He is incorrect.

Under section 2422(b), "[w]hoever, 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 [and imprisoned]." To support a conviction for an attempt crime, the evidence must show "(1) that the defendant had the specific intent to engage in the criminal

conduct for which he is charged and (2) that he took a substantial step toward commission of the offense." *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004).

For purposes of section 2422(b), the term "induce" means to "stimulate the occurrence of" or "cause" the minor to engage in sexual activity. *Id*. at 1287. If a defendant negotiates with "the purported father of a minor" in an attempt "to stimulate or cause the minor to engage in sexual activity with him," that "fits squarely within the definition of 'induce.'" *Id*. Thus, a defendant "who arranges to have sex with a minor through communications with an adult intermediary, by means of interstate commerce, violates § 2422(b)." *Id.* at 1286–88. That is exactly what Gillis did here.

Gillis disagrees with *Murrell* and this Circuit's definition of induce; he instead relies on the law of other circuits. Gillis's brief at 27–28. But under the prior-panel-precedent rule, this Court is bound to follow *Murrell*. *See United States v. Weeks*, 711 F.3d 1255, 1259–60 (11th Cir. 2013) ("a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting en banc").

Gillis also argues that, even under this Circuit's law, the evidence was insufficient to convict him under section 2422(b) because he had abandoned

any initial plan to meet with the 11-year-old and later had agreed to meet only to plan future illicit activity. Gillis's brief at 28–33. To the contrary, overwhelming evidence supports the jury's finding of guilt.

The day before the first planned meeting on September 10, 2015, Gillis told the agent explicitly what he wanted to do with the child: "Play with her … eat her little pussy … have her suck me … penetration etc." Gov't Ex. 2 (9/9, 11:11 a.m.). He backed out of that meeting, concerned he was being set up, but he did not then abandon his plan to have sex with the child. Indeed, on September 14, 2015, Gillis wrote that he had been a "little nervous" because he had "[n]ever been with a young one." Gov't Ex. 2 (9/14, 9:06 a.m.). He asked repeatedly for more pictures of the girl. Gov't Ex. 2 (9/14, 7:09 p.m.; 9/15, 8:26 a.m., 4:03 p.m., 5:50 p.m.; 9/16, 10:15 a.m., 10:39 a.m., 10:45 a.m.). And after the agent sent an additional photograph, Gillis wrote, "Looks she has some tasty little titties … is she still all smooth down below?" Gov't Ex. 2 (9/16, 12:30 p.m.). Finally, when they planned to meet on September 16, 2015, Gillis asked that the girl wear a "sho[r]t skirt no underwear." Gov't Ex. 2 (9/16, 3:05 p.m.).

Gillis's conduct in driving an hour to the Gander Mountain parking lot and his post-arrest admissions likewise confirm that he never abandoned the arrangement for him to have sex with the child. Doc. 151 at 38; Doc. 152 at

18. After his arrest, he admitted that he was there to have sex with the "little girl," and he "specifically affirmed that he wanted to engage in oral sex, vaginal sex, and digital penetration with the little girl." Doc. 152 at 129. He admitted that he first had thought of having sex with a child a couple of years ago when the subject had come up in an online conversation. Doc. 152 at 118, 121. (Indeed, the images and search terms on his computer showed that he sought out child erotica and pornography for years. Gov't Ex. 11; Doc. 152 at 191, 205–10, 242.) And he admitted that, in the days before the meeting, he had masturbated to thoughts of meeting the child and having sex with her. Doc. 152 at 20.

Finally, Gillis testified at trial, claiming that he was not sexually interested in children, Doc. 153 at 195, that he had not told the FBI agents that he had "fantasized about having sex with children," *id.* at 207, that he had talked about the 11-year-old with the agent only because he had wanted to roleplay his fantasy about "the MILF" (the term he used repeatedly when testifying at trial to refer to the victim, M.O.), Doc. 153 at 199; *see also id.* at 207, 213, 214, 217, 218, 220. This testimony, which the jury plainly disbelieved, constituted further evidence of his guilt. *See United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995) ("[A] statement by a defendant, if disbelieved by the jury, may be considered as *substantive evidence* of the defendant's guilt.").

Thus, given this overwhelming evidence of guilt, Gillis has shown no basis for setting aside the jury's verdict on the section 2422(b) count.

II. The district court correctly rejected Gillis's claim that he could not be convicted under 18 U.S.C. § 373 based on his solicitation of kidnapping.

Gillis sought the agent's help in a violent kidnapping plot in which Gillis planned to grab the victim at 4:30 a.m., hood or blindfold her, and then rape her. But Gillis, seeking to extend the ACCA's "categorical approach" to 18 U.S.C. § 373, argues that this Court should ignore the actual conduct that he had solicited and instead presume that he had solicited a form of kidnapping that could be committed without physical force. He argues that a kidnapping hypothetically could be committed without physical force, so it does not satisfy section 373 as a matter of law. This Court should not extend the categorical approach's required blindness to actual conduct to section 373, which expressly focuses on the "conduct" that the defendant is soliciting. But even if this Court were to extend the categorical approach to this context, the jury's verdict establishes that Gillis was soliciting a form of kidnapping that has as an element the use, attempted use, or threatened use of physical force.

A. Section 373 calls for a conduct-based inquiry.

A defendant commits the crime of solicitation to commit a crime of violence if he, "with intent that another person **engage in conduct** constituting

a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to **engage in such conduct**." 18 U.S.C. § 373(a) (emphasis added).

Here, the indictment charged Gillis with soliciting the federal crime of kidnapping by "seizing, confining, kidnapping, abducting, and carrying away" the victim. Doc. 28 at 2. Although the federal kidnapping statute also criminalizes kidnappings committed by "inveigl[ing]" or "decoy[ing]" the victim, *see* 18 U.S.C. § 1201(a), those alternatives were not charged in the indictment or included in the jury instructions here, as Gillis recognizes.[7] *See* Gillis's brief at 34–35; *see also* Doc. 28 at 2, Doc. 110 at 18.

Gillis nonetheless argues that, in deciding whether kidnapping is a crime of violence under section 373, this Court should apply a categorical approach,

[7]The pattern jury instruction for kidnapping lists each of these alternatives in brackets, indicating that the district court generally will instruct the jury on the versions of the crime applicable to that case. *Cf. Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) ("[A]n indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime.").

ignore the actual conduct that he was soliciting and charged with soliciting, and instead ask whether the "least of the acts criminalized" by the federal kidnapping statute hypothetically can be committed without physical force. Gillis's brief at 35. He asserts that the least violent version of the crime that could have formed the basis of the jury's verdict was kidnapping by confinement (acknowledging that the jury's verdict could not have relied on kidnapping by inveiglement or decoy). *Id.* at 33–34 & n.4, 39. But he nonetheless relies on decisions addressing inveiglement or decoy kidnappings to argue that kidnapping is not a crime of violence under section 373 as a matter of law. Gillis's brief at 24, 39–40.

The absence of inveiglement and decoy in the indictment and jury instructions makes this case an easy one—as set forth below, the jury's finding of guilt necessarily rested on a version of the crime that required physical force. But even if the indictment and jury instructions had not been so limited, Gillis's reliance here on the categorical approach's blindness to actual conduct is misplaced. Because section 373 focuses on the actual "conduct" that the defendant solicited, courts should not imagine some hypothetical version of the crime that could be committed with the least possible force. Instead, section 373 requires consideration of the actual "conduct" that the defendant was soliciting, and then asks if that conduct constitutes a felony that has as an

element the use, attempted use, or threatened use of physical force.

The categorical approach's blindness to the defendant's actual conduct makes sense when evaluating whether a prior conviction qualifies as a violent felony under the ACCA. In that context, the Supreme Court explained the "three basic reasons" why courts must turn a blind eye toward "the means by which the defendant, in real life, committed his crimes," and instead apply an "elements-only inquiry." *Mathis v. United States*, 136 S. Ct. 2243, 2252–53 (2016). First, the "ACCA's text favors that approach," because it calls for an enhancement if a defendant has three "previous convictions" for ACCA predicates. *Id.* at 2252. Because Congress chose to focus on whether the defendant was *convicted* of the prior crimes (and not on whether the defendant had *committed* three prior violent offenses), courts should consider the elements of the crime of the prior conviction, not "what the defendant had actually done." *Id.* Second, enhancing the sentence based on the defendant's actual conduct in the prior case rather than on the prior crime's elements would "raise serious Sixth Amendment concerns" if it allowed for increases in statutory penalties based on facts found by judges and not juries. *Id.*; *see also Descamps v. United States*, 133 S. Ct. 2276, 2288 (2013). Third, the categorical approach avoids "unfairness to the defendant," who might not have had the incentive to dispute non-elemental facts in the prior proceeding. *Mathis*, 136 S.

Ct. at 2253.

None of these concerns is present in the section 373 context. First, unlike the ACCA, section 373 does not turn on "previous convictions," but instead focuses on the "conduct" the defendant was soliciting someone to "engage in." *See* 18 U.S.C. § 373 (bolded language above). To turn a blind eye toward conduct would defy the plain language of the statute, which twice asks courts to consider that very "conduct." *See id*. (So, for example, if a defendant hired someone to batter a victim with a hammer, he could not avoid responsibility by saying, "Well, I could have hired him to merely touch the victim."). Second, the Sixth Amendment concerns that underpin the categorical approach for the ACCA are absent in the section 373 context. Third, there is no "unfairness to the defendant" in considering the actual conduct he was soliciting; in a section 373 prosecution, the defendant has every incentive to dispute those facts (and Gillis had a full and fair opportunity to do so here).

Particularly given section 373's conduct-based inquiry, this Court should reject Gillis's invitation to extend the categorical approach to this context. Indeed, under similar language in USSG §7B1.1, courts have found the categorical approach inapplicable. Similar to section 373 ("**conduct constituting** a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of

another"), section 7B1.1 applies to "**conduct constituting** ... a federal, state, or local offense punishable by a term of imprisonment exceeding one year that … is a crime of violence." Section 7B1.1 adopts the career-offender guideline's definition of crime of violence. *See* USSG §7B1.1, comment. (n.2). But, courts have rejected the categorical approach under section 7B1.1 because of its conduct-based inquiry, even though courts ordinarily apply the categorical approach under the career-offender guideline. *See United States v. Golden*, 843 F.3d 1162, 1166–67 (7th Cir. 2016) (defendant's argument that he did not commit a crime of violence under section 7B1.1 incorrectly "assumes that the categorical approach applies—i.e., that we must examine the elements of the generic aggravated-battery offense without regard to Golden's actual conduct"); *United States v. Carter*, 730 F.3d 187, 192 (3d Cir. 2013) ("[i]n the revocation context … the categorical approach does not apply, and district courts may consider a defendant's actual conduct").[8]

In *United States v. McGuire*, 706 F.3d 1333, 1336 (11th Cir. 2013), this Court applied the categorical approach to analyzing whether a crime qualified

[8]In an unpublished decision that the Supreme Court later vacated and remanded on other grounds, this Court applied the categorical approach to section 7B1.1. *See United States v. Cooper*, 598 F. App'x 682 (11th Cir.), *vacated and remanded*, 135 S. Ct. 2938 (2015). But for the reasons set forth above, this Court should not adopt the approach of that non-binding decision.

as a crime of violence under 18 U.S.C. § 924(c)(3), but section 373 presents a stronger case for an actual-conduct analysis than section 924(c), because section 924(c)(3) defines a crime of violence as "an offense that is a felony" and satisfies the force or risk-of-force clauses, while section 373 instead focuses on the solicitation of "conduct constituting a felony" that satisfies the force clause. (Some courts have observed that the categorical approach is a "particularly bad fit" even for section 924(c) cases. *In re Irby*, 858 F.3d 231, 234 (4th Cir. 2017); *see also United States v. Brownlow*, No. 1:15-cr-0034-SLB-SGC, 2015 WL 6452620 at *3 n.3 (N.D. Ala. Oct. 25, 2015) (unpublished) (categorical approach under section 924(c) "may be short lived," because the Supreme Court's "distinction between past convictions and present conduct would appear to foreshadow the abandonment of the categorical approach for § 924(c) offenses in favor of findings of fact based on the actual conduct of the defendant").)

Thus, given the plain language of section 373, this Court should not blind itself to the actual conduct that Gillis solicited in determining whether to uphold his conviction under section 373. The evidence at trial shows that he solicited a violent kidnapping that would have required the use or threatened use of physical force, so this Court need not indulge Gillis's argument that certain other forms of kidnapping hypothetically could be committed without

force. But, as set forth below, even applying the categorical approach as Gillis suggests, this Court should uphold his conviction.

B. Even under a categorical approach, the kidnapping crime that Gillis solicited qualifies as crime of violence.

In applying the categorical approach, Gillis argues that the "least culpable act" that could have formed the basis for the jury's finding of guilt is "kidnapping by confinement." Gillis's brief at 39. (He does not assert that he could have solicited a kidnapping by inveiglement or decoy, because, given the language in the indictment and the jury instructions, the jury could not have found that he had solicited that form of a kidnapping crime. *See* Gillis's brief at 33–34 & n.4, 39.)

But despite Gillis's claim to the contrary, kidnapping by confinement necessarily requires the use, attempted use, or threatened use of physical force against the person of another. *See United States v. Patino*, 962 F.2d 263, 267 (2d Cir. 1992) ("That the crime of kidnapping involves the threatened use of physical force against a person and is thus a crime of violence [under 18 U.S.C. § 924(c)(3)] cannot be questioned.").This Court has determined that the federal kidnapping crime qualifies as a crime of violence under the guidelines, observing that "[k]idnapping is a violent crime," that the guidelines define crime of violence to include an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of

another," and that, by listing kidnapping as an enumerated crime, "[t]he Commission recognized that kidnapping inherently involves the threat of violence." *United States v. Salemi*, 26 F.3d 1084, 1087 (11th Cir. 1994); *see also United States v. Hatfield*, 466 F. App'x 775, 778 (11th Cir. 2012) ("kidnapping is considered a crime of violence" under 18 U.S.C. § 924(c), citing *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999)).

Moreover, the jury instructions here provided that to "'kidnap' a person means to **forcibly** and unlawfully hold, keep, detain, and confine that person against the person's will." Doc. 110 at 18 (emphasis added). The requirement that the victim be confined "forcibly" shows that the crime requires the use, attempted use, or threatened use of physical force. *United States v. Soto-Sanchez*, 623 F.3d 317, 325 (6th Cir. 2010) (Michigan kidnapping offense that required that victim "be imprisoned or confined 'forcibly,'" by "its clear terms … 'has as an element the use, attempted use, or threatened use of physical force against the person of another.'").

Again borrowing from the ACCA despite important differences in the statutory language between the ACCA and section 373, Gillis argues that this Court should apply the definition of "physical force" that the Supreme Court set forth in *Johnson v. United States*, 559 U.S. 133, 140 (2010), which held that a Florida battery crime that could be committed by a mere touching was not

categorically an ACCA violent felony. *Johnson* explained that, in the context of the ACCA, "the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Id*. For starters, a defendant cannot accomplish a kidnapping by confinement without force or threatened force that far exceeds the mere touching found inadequate in *Johnson*. But, in any event, it does not work to simply graft *Johnson*'s ACCA definition of "physical force" onto section 373. The capable-of-causing-pain-or-injury standard works for the elements clause of the ACCA and the career-offender guideline, which reach only physical force against persons, but section 373's elements clause is broader and encompasses physical force against property (which obviously can't feel pain).

A more analogous force clause appears in 18 U.S.C. § 924(c)(3)(A) ("has as an element the use, attempted use, or threatened use of physical force against the person or property of another"), so this Court's decision applying that force clause in *United States v. McGuire*, 706 F.3d 1333 (11th Cir. 2013), provides better guidance. In *McGuire*, this Court recognized that even indirect force can satisfy section 924(c)(3)(A). The jury found that McGuire had attempted to "set[] fire to, damage[], destroy[], disable[], or wreck[] an[] aircraft in the special aircraft jurisdiction of the United States." 18 U.S.C. § 32(a)(1). McGuire argued that the disabling-an-aircraft version of the crime did

not satisfy the force clause, because that crime could be committed by "'deflating the tires, disabling the ignition, or disengaging the fuel lines' while the airplane is on the ground, or 'disconnecting the onboard circuitry, disabling the radio transponder ... and interfering with the aircraft's radio equipment' while the plane is in the air." *McGuire*, 706 F.3d at 1337. But this Court determined that "attempting to disable an aircraft *while people are on board* is itself an act of force in the meaningful sense." *Id*. at 1337 (emphasis in original). The Court explained:

> It makes little difference that the physical act, in isolation from the crime, can be done with a minimum of force; we would not say that laying spikes across a roadway is a non-violent crime because laying something upon the ground is not a forceful act. It still involves an intentional act against another's property that is calculated to cause damage and that is exacerbated by indifference to others' wellbeing. Likewise, the fact that deflating an airplane's tire or rewiring its onboard systems are minimally forceful acts does not mean that such acts of sabotage against a loaded plane are not crimes that involve the use of force against that plane or its passengers.

Id. at 1338.

Likewise here. Even if it takes only a gentle push to close a car trunk and trap a victim inside, or the mere turn of a key to lock a door and prevent the victim's escape, to focus on these "minimally forceful acts" misses the point, when kidnapping by confinement necessarily requires force or threatened force sufficient to confine the victim—that is, to overcome the victim's resistance

and prevent the victim's escape. *Cf. United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014) (rejecting argument that a poisoner doesn't use force when sprinkling poison in victim's drink; "That the harm occurs indirectly, rather than directly (as with a kick or punch) does not matter."). Kidnapping by confinement is an active, violent crime that causes "a serious interference with the freedom, safety, and security of others," *McGuire*, 706 F.3d at 1337–38—a more direct use of force against a person than the crime of disabling an aircraft. If disabling an aircraft satisfies the force clause, that must be true of kidnapping by confinement too.

Gillis also relies on cases stating that kidnappings may be committed using "psychological force," "mental restraint," or by "luring" or "decoy[ing]" the victim. Gillis's brief at 24, 39–40. But his reliance on these cases is misplaced, because the indictment did not charge Gillis with having solicited a "decoy" or "inveiglement" kidnapping, and the jury could not have convicted on that basis. That is the crucial difference between this case and *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017). In *Jenkins*, every statutory variation (including kidnapping by decoy or inveiglement) was in play. Not so here.[9]

[9] *Jenkins* relied on a deception form of kidnapping in positing that the crime could be committed without physical force, imagining that the "perpetrator could lure his victim into a room and lock the victim inside against his or her will." *Jenkins*, 849 F.3d at 393. In any event, although the

Moreover, to the extent that Gillis suggests an inveiglement kidnapping would involve no force at all, that is incorrect. Even in an inveiglement kidnapping, the defendant must have had the intent to use force to complete the kidnapping if the pretense fails. *See United States v. Boone*, 959 F.2d 1550, 1557 (11th Cir. 1992) (inveiglement kidnapping "requires the alleged kidnapper to have formed the intent to use forcible action, in the event his deception failed, to complete the kidnapping"); *see also* Eleventh Circuit Pattern Jury Instructions (O49 Kidnapping) ("Inveiglement or decoying someone across state lines is not in and of itself conduct proscribed by the federal kidnapping statute. 'Inveiglement' becomes unlawful under the federal kidnapping statute 'when the alleged kidnapper interferes with his victim's action, exercising control over his victim through the willingness to use forcible action should his deception fail.'" (quoting *Boone*, 959 F.2d at 1555 n.5)).

The case that Gillis cites to argue that a "kidnapping by confinement" may be accomplished by merely transporting a nonconsenting victim across state lines without any use or threatened use of force does not in fact show that. *See* Gillis's brief at 39 (relying on *United States v. Chancey*, 715 F.2d 543, 546 (11th Cir. 1983)). *Chancey* did not analyze the proof required to establish

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"luring" might be accomplished without physical force, once the perpetrator has locked the victim into a confined space and prevented her escape, he has indeed used physical force against her person, as set forth above.

"kidnapping by confinement"; instead, the defendant there was charged with various forms of kidnapping. *See Chancey*, 715 F.2d at 544 (indictment charged that defendant "did seize, confine, inveigle, kidnap, abduct, and carry away" victim). *Chancey* held that the evidence was insufficient to show that the victim had been "transported involuntarily." *Id.* at 548. So *Chancey* does not show that a kidnapping by confinement may be accomplished without the use or threatened use of physical force.

Gillis also relies, in a footnote, on a false-imprisonment case, arguing that "Florida false imprisonment can never qualify as a violent felony," and arguing that this supports his claim that kidnapping should not count either. Gillis's brief at 38–39 n.6. But that is not the law of this Circuit. In *United States v. Rosales-Bruno*, 676 F.3d 1017, 1022 (11th Cir. 2012), this Court concluded "that false imprisonment under Florida law encompasses several distinct crimes, some of which qualify as crimes of violence and others of which do not."

Finally, this Court has recognized that its application of the force clause must be grounded in reality, not in fanciful law-school hypotheticals. *See United States v. Vail-Bailon*, No. 15-10351, 2017 WL 3667647 (11th Cir. Aug. 25, 2017) (published) (en banc) ("[T]he need to focus on the least culpable conduct criminalized by a statute 'is not an invitation to apply 'legal

imagination' to the statute.'"). Particularly when the indictment and jury instructions remove any possibility that the jury could have found kidnapping by inveiglement or by decoy (the only potentially close cases), this case is straightforward. The district court correctly rejected Gillis's claim that the kidnapping crime he solicited is not a crime of violence as a matter of law, and this Court should affirm.

III. The district court did not abuse its discretion or violate Gillis's constitutional rights by refusing to permit Gillis to present testimony from his proffered experts on certain issues, and, in any event, any error would be harmless beyond a reasonable doubt given the overwhelming evidence of his guilt.

The district court did not abuse its discretion or violate Gillis's constitutional rights when it refused to allow Gillis to elicit proffered expert testimony on certain issues.

Under Federal Rule of Evidence 702, a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

As the Supreme Court made clear in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the trial court performs a "critical 'gatekeeping' function" concerning the admissibility of expert testimony. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc). The trial court has "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Kumho Tire*, 526 U.S. at 141.

The "importance of *Daubert*'s gatekeeping requirement cannot be overstated." *Frazier*, 387 F. 3d at 1260. The trial court must "'make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Id.* (quoting *Kumho Tire*, 526 U.S. at 12). The "district court's role is especially significant since the expert's opinion 'can be both powerful and quite misleading because of the difficulties in evaluating it.'" *Id.* (quoting *Daubert*, 509 U.S. at 595).

The proponent of expert testimony bears the burden of demonstrating the expert's competence and the reliability of the expert's methodology. *Frazier*, 387 F.3d at 1260. This Court considers whether (1) "the expert is qualified to

testify competently regarding the matters he intends to address," (2) the expert's methodology is "sufficiency reliable" under *Daubert*, and (3) "the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Frazier*, 387 F.3d at 1260. The determination of admissibility is "uniquely entrusted to the district court," which has "considerable leeway." *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005).

Here, Gillis contends that the district court's refusal to permit him to present expert testimony on certain issues violated his Fifth and Sixth Amendment rights to present a defense. Gillis's brief at 41–49. In evaluating constitutional claims like these, this Court first examines whether "the right was actually violated," then considers "whether this error was 'harmless beyond a reasonable doubt.'" *United States v. Hurn*, 368 F.3d 1359, 1362–63 (11th Cir. 2004).

"While the Constitution unquestionably provides a defendant with the right to be heard, this right is not unbounded." *Frazier*, 387 F.3d at 1271. "[A] court may constitutionally enforce evidentiary rules to limit the evidence an accused … may present in order to ensure that only reliable opinion testimony is admitted at trial." *Id.* at 1272. "[W]hile a criminal defendant must be given every meaningful opportunity to present a complete defense, in doing so he

must comply with the procedural and evidentiary rules designed to facilitate a search for the truth." *Id.*

The district court did not abuse its discretion or violate Gillis's constitutional rights by refusing to allow Herriot to testify as an expert about fantasy and roleplay in internet communications.[10] The court carefully considered Herriot's qualifications and research. Among other things, the court found that, although Herriot had held himself out as a professor, his position was unpaid, he taught no classes, he had no office at the institute, and he served only as an as-needed mentor to graduate students; that Herriot's internet research had occurred in a different context and had taken place in the 1990s and early 2000s (an eternity ago, given how much the internet has changed since then); that his research was unpublished and not peer reviewed; and that he had not adequately identified the academic sources on which he had relied. *See* Doc. 83 at 7–11. Gillis has shown no abuse of discretion. *See United States v. Friedlander*, 395 F. App'x 577, 581 (11th Cir. 2010) (district court committed no error in precluding testimony about the prevalence of "internet fantasy" when the "expert's opinion was unreliable as it was not based on the DSM IV or quantifiable scientific methodology").

[10]The court ruled that he could testify as an expert about how the internet works and how people communicate on it generally, but Gillis chose not to call him for that purpose.

Moreover, as the district court also recognized, it's common knowledge that people sometimes lie on the internet and are not always who they claim to be, so general testimony that sometimes people engage in fantasy roleplay on the internet would not assist the jury in deciding if Gillis was doing that here. Doc. 83 at 11; *see Frazier*, 387 F.3d at 1262–63 (expert testimony may assist trier of fact if "it concerns matters that are beyond the understanding of the average lay person," but it "generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments").

Gillis relies heavily on a decision from another circuit encouraging the district court in that circuit—which also had refused to permit Herriot to testify about roleplaying in sexually explicit conversations on the internet—to "give a more thorough consideration" to that issue on remand. *See United States v. Joseph*, 542 F.3d 13, 21 (2d Cir. 2008). Herriot's study of internet chat rooms was a better fit with the *Joseph* crime, which began in an internet chat room—while the crime here began with a Craigslist ad. And, at the time of *Joseph*, Herriot's research was less dated and jurors perhaps were less familiar with the internet. But, in any event, one circuit's opinion that the district court should analyze the issue carefully before excluding an expert's testimony does not establish that the district court's careful analysis here was an abuse of

discretion. *See, e.g., Frazier*, 387 F.3d at 1259 (abuse-of-discretion standard recognizes "range of possible conclusions" that trial judge may reach; "there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call").

The district court likewise did not abuse its discretion in refusing to permit Sullivan to present expert testimony that Gillis "does not appear to have persistent sexual attraction to children." This Court considered a similar issue in *United States v. Godwin*, 399 F. App'x 484, 486, 488 (11th Cir. 2010). Like Gillis, Godwin was charged with violating section 2422(b). Godwin sought to present expert testimony from a forensic psychologist that he was not a pedophile or a predator. On appeal, Godwin argued that "the exclusion of this testimony deprived him of the right to present evidence" in support of his entrapment defense, "namely, that he was not predisposed to commit the crime prior to the Government's inducement." *Id.* at 488. This Court found no abuse of discretion because "[t]he issue of whether Godwin was a pedophile or predator was not relevant to the elements of § 2422(b), to the entrapment defense, or to rebut an argument of the Government," and that "[t]estimony on the subject of pedophilia and child predators … would have confused or misled the jury as to whether Godwin was on trial for being a pedophile or predator rather than for the crime with which he was actually charged." *Id.*

Likewise here. To convict Gillis of the section 2422(b) attempt crime, the jury had to decide whether he had "knowingly intended to commit the crime of persuading, inducing, enticing, or coercing a minor to engage in sexual activity," Doc. 110 at 16, not whether he had a persistent sexual attraction to children. Indeed, Gillis's use for this sort of expert testimony was even less defensible than Godwin's because Gillis did not raise an entrapment defense and thus did not have to establish that he had not been predisposed to commit the crime before the inducement. *See United States v. Orsinord*, 483 F.3d 1169, 1178 (11th Cir. 2007). So if no abuse of discretion occurred in *Godwin*, no abuse of discretion occurred here either.

Gillis argues that it was unfair that the district court permitted the United States to present Federal Rule of Evidence 404(b) evidence of Gillis's internet search history when he could not rebut that evidence with expert testimony that he did not have the "motive" or "intent" to engage in attempted child enticement. Gillis's brief at 45. But he bases this argument on a false equivalency—although he suggests that the United States' Rule 404(b) evidence and his proffered expert testimony should receive the same treatment, Rule 404(b) allows for admission of his internet searches for child pornography to show his motive, intent, and absence of mistake or accident, but Rule 704(b) prohibits an expert in a criminal case from opining about the defendant's intent

or state of mind. *See United States v. Anderson*, 509 F. App'x 868, 873 (11th Cir. 2013) (when defendant in section 2422(b) case sought to present testimony from doctor who had evaluated defendant and had seen no credible evidence of "pedophilic interests" and had opined that "manipulation" by law enforcement had occurred, this Court found no abuse of discretion in exclusion because "the proffered expert testimony that [defendant] did not intend to have sex with the child victims and that [the defendant] was enticed by law enforcement" was prohibited under Rule 704(b)).

The rulings on the expert testimony did not foreclose Gillis's ability to present a defense. Indeed, Gillis himself testified that he was merely roleplaying and that he had no sexual attraction to children, and the jury was entitled to consider his demeanor and the other evidence in deciding whether to accept his testimony. *See Frazier*, 387 F.3d at 1272 (rejecting defendant's claim that exclusion of his expert's testimony denied him fundamentally fair trial when "the essence of [the expert's] testimony was admitted at trial through alternative means"). In short, the district court's exclusion of some portions of the experts' opinions was not an abuse of discretion and "did not prevent [Gillis] from introducing the key elements of his defense and placing his story before the jury." *Id.* at 1272.

Finally, any error in refusing to permit Gillis to present expert testimony

on certain points would be harmless beyond a reasonable doubt given the overwhelming evidence of guilt set forth in the Statement of Facts above. *See United States v. Culver*, 598 F.3d 740, 750 (11th Cir. 2010) (even if district court erred by excluding evidence, "any such error was harmless because the evidence establishing [defendant's] guilt was overwhelming"); *Anderson*, 509 F. App'x at 873 (even if defendant had shown an abuse of discretion in exclusion of expert testimony, "the error would be harmless" given the overwhelming evidence supporting the jury's verdict).

Conclusion

The United States respectfully requests that this Court affirm the judgment of the district court.

Respectfully submitted,

W. STEPHEN MULDROW
Acting United States Attorney

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division

By: *s/ Michelle Thresher Taylor*
MICHELLE THRESHER TAYLOR
Assistant United States Attorney
Appellate Division
Florida Bar No. 529346
400 N. Tampa St., Ste. 3200
Tampa, FL 33602
(813) 274-6000
michelle.taylor@usdoj.gov

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ADEEL M. BASHIR
Federal Public Defender's Office

Counsel for Dane Gillis

s/ Michelle Thresher Taylor
MICHELLE THRESHER TAYLOR
Assistant United States Attorney

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