No. 18-5164

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE ADRIEN BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPPOSITION

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QUESTION PRESENTED

Whether the district court committed reversible error in its instruction to the jury about inducement in a prosecution for attempting to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is not published in the Federal Reporter but is reprinted at 723 Fed. Appx. 671.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2018. A petition for rehearing was denied on April 4, 2018 (Pet. App. B1). The petition for a writ of certiorari was filed on July 3, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of using a facility or means of interstate commerce to attempt to persuade, induce, or entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b). Pet. App. C1. Petitioner was sentenced to 216 months of imprisonment, to be followed by nine years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at A1-A12.

1. In September 2015, FBI Special Agent Rodney Hyre, the agent in charge of a group that investigated sexual predators in Florida, found an ad posted on Craigslist by petitioner that Special Agent Hyre suspected had been placed by a sexual predator seeking children with whom to engage in sexual activities in the Orlando area. Pet. App. A4; Gov't Ex. 1. Posing as the father of a ten-year-old boy and a 13-year-old girl, Special Agent Hyre responded to petitioner's ad. Pet. App. A4; Gov't Ex. 3, at 93. Petitioner answered Special Agent Hyre's email, and in subsequent correspondence over the next several days, petitioner expressed an interest in having sex with Special Agent Hyre's fictitious children. Pet. App. A4; Gov't Ex. 3, at 94-133; see Gov't C.A. Br. 5-8.

Petitioner gave Special Agent Hyre his phone number, and in a recorded phone conversation petitioner indicated that he wanted

to have sex with Special Agent Hyre's ten-year-old son. Pet. App. A4; Gov't Ex. 3, at 134. Petitioner stated that he was interested in "touching," "holding," "oral," and "kissing," and he was open to "giving" and "receiving." Pet. App. A4. Petitioner also said that he had previously responded to an online ad posted by the father of a 12-year-old boy by sending an email expressing his interest. Ibid. Special Agent Hyre and petitioner agreed to meet at a local shopping center. Ibid.; Gov't Ex. 5, at 7-8. Special Agent Hyre inquired whether he should bring both of his (fictitious) children, but petitioner answered, "let's just start with your boy." Gov't Ex. 5, at 8. Petitioner subsequently asked via email whether he should groom his genitals, and Special Agent Hyre replied that "trimmed is probably best." Pet. App. A4; Gov't Ex. 3, at 139. Special Agent Hyre emphasized that the encounter would be "consensual." Gov't Ex. 3, at 163; see id. at 131; see also Gov't C.A. Br. 8-12.

On the day of the planned meeting, petitioner parked behind an officer who was posing as the father with whom petitioner had been communicating. Pet. App. A4. Petitioner approached the officer and was then arrested. Ibid. Petitioner "admitted that he had posted several online ads regarding incestuous sex, that he had used his cellphone to communicate with Special Agent Hyre about having oral sex with Hyre's ten-year-old son, [and] that he had traveled to the shopping center for that purpose." Ibid.

Petitioner also consented to searches of his cellphone and email accounts, and a forensic analysis showed that all of the emails between petitioner and Special Agent Hyre had been transmitted through petitioner's cellphone. Ibid.

2. A grand jury in the Middle District of Florida returned an indictment charging petitioner with one count of using facilities and means of interstate commerce to attempt to persuade, induce, and entice a person he believed to be a minor to engage in sexual activity for which any person could be charged with a crime, in violation of 18 U.S.C. 2422(b). Indictment 1. The government and petitioner proposed differing instructions regarding (inter alia) the elements of a Section 2422(b) violation. Compare D. Ct. Doc. 37, at 15-18 (Feb. 8, 2016), with id. at 19-21. At trial, substantially following the Eleventh Circuit pattern jury instruction, the district court instructed the jury that the government had to prove:

> One, [petitioner] knowingly persuaded, induced or enticed an individual to engage in sexual activity, as charged;
>
> Two, [petitioner] used a computer, cell phone or the Internet to do so;
>
> Three, when [petitioner] did these acts, he believed [that] the individual was less than 18 years old; and
>
> Four, if the sexual activity had occurred, [petitioner] could have been charged with a criminal offense under Florida Statute, Subsection 794.011.

3/4/16 Tr. 37; cf. Eleventh Circuit Pattern Jury Instructions, Criminal Cases § 92.2 (2015).

The district court instructed the jury that, to violate Section 2422(b), petitioner need not have communicated directly with an individual under 18 years of age. 3/4/16 Tr. 38. The court explained that "[i]t is sufficient if [petitioner] induce[d] the individual to engage in unlawful sexual activity by communicating with an adult intermediary for that purpose." Ibid. The government requested additional language in the instruction concerning communication through an adult intermediary, designed to avoid possible jury confusion, but the court denied that request, indicating that the additional language was unnecessary to avoid such confusion. See 3/3/16 Tr. 238-239; 3/4/16 Tr. 13.

The district court additionally instructed the jury that "'induce' means to stimulate the occurrence of or to cause." 3/4/16 Tr. 38. Petitioner had requested an instruction that the government must prove that a defendant "knowingly intended to change the mental state of a minor, that is, cause the assent of a minor to engage in unlawful sexual activity." Id. at 4. The court denied that request, explaining that it presented "exactly" the risk of juror "confus[ion]" the government had identified in requesting "an expanded intermediary language instruction" and that such an instruction would be inconsistent with the court's denial of the government's request. Ibid. In the alternative, petitioner requested that the court modify the instructions' definition of "'induce'" to "include * * * at the end, 'to cause

the assent of a minor to engage in unlawful sexual activity.'" Id. at 22-23. The court denied that alternative request as well, stating that, although the court did not believe that instruction was "legally flawed," the court "th[ought] in the context of this case, with the battle over the intermediary argument," petitioner's definition would be "confusing, based on how this ha[d] unfolded." Id. at 23.

Finally, the district court also instructed the jury that, to prove that petitioner was guilty of the charged attempt crime, the government had to show that petitioner knowingly intended to commit the crime of persuading, inducing, or enticing a minor to engage in criminal activity, and that his intent was corroborated by his taking a substantial step towards committing the crime. 3/4/16 Tr. 38-39.

The jury found petitioner guilty of violating 18 U.S.C. 2422(b). Pet. App. A5. Petitioner was sentenced to 216 months of imprisonment. Id. at C2-C3.

3. The court of appeals affirmed in an unpublished decision. Pet. App. A1-A12. The court "review[ed] de novo the legal correctness of [the] jury instructions" and "review[ed] the district court's phrasing for abuse of discretion," explaining that its "goal [wa]s to determine whether the instructions misstated the law or misled the jury to the prejudice of the objecting party." Id. at A7 (citations and internal quotation

marks omitted). The court of appeals rejected petitioner's contentions that the district court's instruction on inducement, which had "adhered to" the Eleventh Circuit's "pattern jury instruction," was "incomplete and misleading," and that it "should have defined 'induce' to mean 'to stimulate the occurrence of or to cause the assent of a minor to engage in unlawful sexual activity.'" Ibid. The court of appeals determined that petitioner's argument was "foreclosed" by United States v. Murrell, 368 F.3d 1283 (11th Cir.), cert. denied, 543 U.S. 960 (2004). Pet. App. A7. The court observed that, in Murrell, it had "held that the term 'induce' in § 2422 means 'to stimulate the occurrence of; cause.'" Ibid. (brackets and citation omitted). The court here determined that, because the district court had given that same definition of "induce" here, the court of appeals "c[ould] not conclude that the district court misstated the law or misl[ed] the jury," and "[c]onsequently, the district court did not abuse its discretion in instructing the jury on the term 'induce.'" Ibid.

ARGUMENT

Petitioner contends (Pet. 9-10) that the district court erred in instructing the jury that "induce" in 18 U.S.C. 2422(b) means to "stimulate" or "cause," and that the jury should have been instructed that the government was required to prove that petitioner had "the intent to cause a minor's assent to sexual

activity, and not the intent to engage in sex with a minor." The court of appeals correctly determined that the district court did not commit reversible error in phrasing its instruction on inducement. The court of appeals' unpublished decision does not conflict with any decision of this Court or another court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari seeking review of decisions of the Eleventh Circuit on the same or substantially similar questions. See Grafton v. United States, 138 S. Ct. 2651 (2018) (No. 17-7773); Matlack v. United States, 137 S. Ct. 2293 (2017) (No. 16-7986); Rutgerson v. United States, 137 S. Ct. 2158 (2017) (No. 16-759); Reddy v. United States, 135 S. Ct. 869 (2014) (No. 14-5191) (plain-error posture). It should follow the same course here.

1. a. Section 2422(b) imposes criminal liability on a person 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 or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. 2422(b). As the courts of appeals have unanimously recognized, this provision may be violated where a defendant communicates only with an adult intermediary instead of with the minor directly, so long as the defendant acts with the requisite intent. See United States v. Roman, 795 F.3d 511, 516 (6th Cir.

2015) (collecting cases). Petitioner acknowledged as much in the district court, see D. Ct. Doc. 37, at 20; see also 3/3/16 Tr. 260, and he does not appear to argue otherwise in this Court.

In this case, the district court did not commit reversible error in instructing the jury on the requirements for proving an attempted violation of Section 2422(b). The key elements of an attempt offense are (1) the "intent" to commit the substantive offense and (2) the taking of a "substantial step" towards its commission. United States v. Hite, 769 F.3d 1154, 1162 (D.C. Cir. 2014). Here, the jury instructions on the requisite intent for a Section 2422(b) violation largely tracked the language of the statute, requiring the government to prove that petitioner knowingly intended to commit the crime of persuading, inducing, or enticing a minor to engage in sexual activity, and that his intent was corroborated by his taking a substantial step towards committing the crime. 3/4/16 Tr. 38-39.

Petitioner contends (Pet. 9-10) that the district court's instruction defining the term "induce" to mean "to stimulate the occurrence of or to cause" was erroneous. That contention lacks merit. In United States v. Murrell, 368 F.3d 1283, cert. denied, 543 U.S. 960 (2004), the Eleventh Circuit concluded that Section 2422(b) applied where the defendant had negotiated with an adult intermediary (a detective posing as the minor's father) to pay for sex with a 13-year-old girl, even though the defendant had not

directly communicated with the minor. See id. at 1286-1288. In reaching that conclusion, which accords with the conclusions of other circuits and which petitioner does not contest, the court observed that "'[i]nduce' can be defined in two ways": either as "'to lead or move by influence or persuasion; to prevail upon,' or alternatively, 'to stimulate the occurrence of; cause.'" Id. at 1287 (citation and brackets omitted). The court reasoned that the first definition would make "induce" "essentially synonymous with the word 'persuade,'" which also appears in Section 2422(b). Ibid. It also "note[d] 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." Ibid. The court applied the second definition and found that the defendant's conduct fell "squarely within the definition of 'induce'" because he "attempted to stimulate or cause the minor to engage in sexual activity." Ibid. The court explained that the defendant's actions, which included bringing a teddy bear with him to the negotiated rendezvous, "unequivocally" showed that he "intended to influence a young girl into engaging in unlawful sexual activity." Id. at 1288.

Petitioner contends (Pet. 9-10) that the court of appeals' textual analysis of "induce" in Murrell, which was incorporated into the district court's instructions here, fails to "focus on the mens rea Congress[] clearly wanted to proscribe -- the intent

to cause a minor's assent to sexual activity, and not the intent to engage in sex with a minor." That criticism is misplaced, as the Eleventh Circuit's approach is consistent with that asserted purpose. As petitioner acknowledges (Pet. 3-4, 8-9), in subsequent decisions construing and applying Murrell, the Eleventh Circuit has made clear that Section 2422(b) requires the government to prove that (1) "the defendant intended to cause assent on the part of the minor, not that he 'acted with the specific intent to engage in sexual activity,'" and (2) "the defendant took a substantial step toward causing assent, not toward causing actual sexual contact." United States v. Lee, 603 F.3d 904, 914 (quoting United States v. Yost, 479 F.3d 815, 819 n.3 (11th Cir. 2007) (per curiam)), cert. denied, 562 U.S. 990 (2010); see ibid. ("The statute 'criminalizes an intentional attempt to achieve a mental state -- a minor's assent.'" (quoting United States v. Dwinells, 508 F.3d 63, 71 (1st Cir. 2007), cert. denied, 554 U.S. 922 (2008)) (emphasis omitted). Indeed, the court of appeals here reaffirmed Lee's articulation of the requisite intent in rejecting petitioner's related contention that the evidence "was insufficient to show that [petitioner] intended to cause or took a substantial step towards causing a minor to assent to sexual activity, as required for an attempt conviction under § 2422(b)." Pet. App. A10; see ibid. ("With regard to intent, the government must prove that the defendant intended to cause assent on the part

of the minor, not that he 'acted with the specific intent to engage in sexual activity.'" (quoting Lee, 603 F.3d at 914)).

b. Petitioner additionally contends (Pet. 10-11) that review is warranted because the district court's inducement instruction in this case is inconsistent with those principles and with Lee because the instruction did not adequately reflect that a defendant must intend to cause a minor's assent to sexual activity. Petitioner argues (Pet. 10) that the instruction improperly "advise[d] jurors that the proscribed intent under the statute is the intent to engage in sex with a minor," and that the district court erred by declining to add language "to clarify that the proscribed intent is the intent [to] cause a minor's assent to sexual activity." Even assuming petitioner were correct that the district court misapplied the approach endorsed by the court of appeals in Lee to the circumstances of this particular case, that contention would not warrant this Court's review. See Sup. Ct. R. 10. In any event, petitioner fails to show that the district court committed reversible error in its phrasing of the inducement instruction.

A trial court "has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." Boyle v. United States, 556 U.S. 938, 946 (2009). When an instruction is challenged on the ground that it is susceptible of an erroneous interpretation, the "proper

inquiry" is whether there is a "reasonable likelihood" that the jury in fact misapplied the instruction in context. See Victor v. Nebraska, 511 U.S. 1, 6 (1994). Moreover, an individual jury instruction is not judged in isolation, but in the context of the entire charge. Boyd v. United States, 271 U.S. 104, 107 (1926).

Contrary to petitioner's contention (Pet. 9-10), the district court's inducement instruction did not "advise[] jurors that the proscribed intent under the statute is the intent to engage in sex with a minor," rather than "intent to cause a minor's assent to sexual activity." The instruction explained that, to violate Section 2422(b), a defendant must have "knowingly persuaded, induced or enticed an individual" he believed to be a minor -- either directly or through an intermediary -- to "engage in sexual activity" that would have been a criminal offense, and that "induce" meant "to stimulate the occurrence of or to cause." 3/4/16 Tr. 37-38. Although it did not refer specifically to causing a minor's "assent," in context the instruction was most naturally understood that way. The instructions referred to the defendant's inducement (i.e., causation) of "an individual to engage in sexual activity," id. at 37 (emphasis added), not inducement of sexual activity in itself. No reasonable likelihood exists that the jury would have understood the instruction to require only that petitioner had "the intent to engage in sex with a minor." Pet. 10.

Nor did the district court abuse its discretion by declining to include petitioner's proposed additional language defining "induce" to mean to cause a minor's assent to sexual activity. The court recognized that in the abstract petitioner's proposed language was not "legally flawed." 3/4/16 Tr. 23. But the court explained that the additional "assent" language petitioner proposed would have been "confusing" to the jury "in the context of this case." Ibid. The court observed that it had previously denied a request by the government for additional clarifying language in the instructions addressing inducement through intermediaries and determined that an instruction proposed by petitioner -- requiring the jury to find that petitioner "knowingly intended to change the mental state of a minor, that is, cause the assent of a minor to engage in unlawful sexual activity" -- risked introducing the very confusion the government had sought to avoid. 3/4/16 Tr. 4, 23; see id. at 13. Petitioner alternatively requested the modified definition of "induce" that he now presses, but the court again found that, given "the battle over the intermediary argument" and "based on how this ha[d] unfolded," his proposed language would be "confusing." Id. at 23. The court did not abuse its discretion in determining that petitioner's proposed language risked creating jury confusion in the specific circumstances of this case, and its fact-dependent, case-specific determination does not warrant further review.

2. Petitioner contends (Pet. 8-9) that review is warranted to resolve "tension" among the courts of appeals about the meaning of "induce" in Section 2422(b). That contention lacks merit.

Petitioner argues that the court of appeals' approach is inconsistent with decisions of the First, Second, Sixth, and District of Columbia Circuits that "have stated [that] the proscribed intent is causing a minor to assent to sexual activity." Pet. 9 (citing Hite, 769 F.3d at 1162; Dwinells, 508 F.3d at 68; United States v. Brand, 467 F.3d 179, 202 (2d Cir. 2006), cert. denied, 550 U.S. 926 (2007); and United States v. Bailey, 228 F.3d 637, 639 (6th Cir. 2000), cert. denied, 532 U.S. 1009 (2001)). As petitioner acknowledges (ibid.), however, the Eleventh Circuit reached the same conclusion in its published decision in Lee. See 603 F.3d at 914. The court of appeals' unpublished decision in this case, in turn, is consistent with Lee, see pp. 11-14, supra, and it expressly reaffirmed Lee's interpretation of Section 2422(b), see Pet. App. A10. In any event, even if the court of appeals had failed to apply its precedent correctly, that would be a matter for the Eleventh Circuit, not this Court, to address. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

3. Even assuming the question petitioner raises otherwise warranted this Court's review, this case would be an unsuitable

vehicle in which to address it. Even if the jury instructions had included petitioner's proposed additional language regarding a minor's "assent," no reasonable possibility exists that the differently worded instruction would have changed the outcome of the trial.

The government presented extensive evidence that petitioner intended to cause Special Agent Hyre's fictitious ten-year-old son to assent to engaging in sex with petitioner. Special Agent Hyre repeatedly stressed in his correspondence with petitioner that any sexual activity with his children would be "consensual," Gov't Ex. 3, at 131, 163, and petitioner proceeded to plan the encounter with the ten-year-old son on that understanding, see p. 3, supra. Petitioner and Special Agent Hyre discussed the specific sexual activities petitioner would engage in with the son and what the son would be comfortable doing. See, e.g., Gov't Ex. 3, at 109-110, 112, 133; see also Pet. App. A4; Gov't C.A. Br. 8-10. The evidence thus amply established that petitioner intended to cause the assent of a person he believed to be a minor to engage in illegal sexual activity. Petitioner's suggestion (Pet. 12) that the son had pre-assented to sexual activities with petitioner, before petitioner even began to negotiate what they would be, is unsound.

Moreover, petitioner's counsel argued extensively at closing (without objection) that the government was required but had failed

to prove that petitioner intended to cause Special Agent Hyre's children to assent to sexual activity. See, e.g., 3/4/16 Tr. 61-64, 67, 70. The jury nevertheless found petitioner guilty, and the court of appeals specifically rejected petitioner's contention on appeal that the evidence was insufficient to show that petitioner intended to cause a minor to assent to sexual activity. Pet. App. A10. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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