No. 18-5164

IN THE

Supreme Court of the United States

GEORGE ADRIEN BROOKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

Donna Lee Elm
Federal Defender

Conrad Benjamin Kahn, Counsel of Record
Research and Writing Attorney
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: Conrad_Kahn@fd.org

QUESTION PRESENTED

Whether the required intent for attempted inducement under 18 U.S.C. § 2422(b) is the intent to cause a minor to engage in sexual activity (as the Eleventh Circuit held in this case), or the intent to change a minor's mental state about engaging in sexual activity (as most other circuits have held).

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I. The District Court's Erroneous Instruction

Contrary to the government's suggestion, the district court reversibly erred by giving an erroneous instruction on the definition of inducement under § 2422(b). In *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004), the Eleventh Circuit held that "inducement" under § 2422(b) means "to stimulate the occurrence of or to cause." The government inaccurately frames Mr. Brooks' argument here, stating that Mr. Brooks argues *Murrell* was erroneously decided. BIO at 9. That is *not* Mr. Brooks' contention. *Murrell* is fine as far as it went, but it did not state what it is that must be "stimulated" or "caused." As the government itself acknowledges, the Eleventh Circuit later clarified in *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010), that the statute "criminalizes an intentional attempt to achieve a *mental* state—a minor's assent." BIO at 11.[1] The problem here, and in most § 2422 (b) prosecutions in the Eleventh Circuit, is that the jury was not made aware of that clarification. As explained in Mr. Brooks' petition, the Eleventh Circuit's pattern instructions, which were used here over Mr. Brooks' objection, define "induce" just as *Murrell* did—to "stimulate the occurrence of or to cause." Pet. at 10. However, the instructions lack the Eleventh Circuit's subsequent clarification in *Lee* that the thing needing to be "stimulated" or "caused" is a minor's assent. *Id.* What makes matters worse is that *Murrell*'s definition, when plugged into the elements of the offense, advises the jury that the proscribed intent is the intent to cause a minor to engage in sexual

[1] Indeed, the district court recognized Mr. Brooks' requested instruction was not "legally flawed," and the government does not dispute otherwise. *See* BIO at 14.

activity, which is exactly what *Lee* (and nearly every other circuit) has said is not the proscribed intent. *See* Pet. at 3–4.[2]

The government responds to Mr. Brooks' challenge to the jury instructions by stating: (1) the instructions were clear in context; and (2) the district court did not abuse its discretion in deciding not to instruct on the assent requirement because it was "confusing." BIO at 12–14. The government is incorrect.

As explained above, the definition of inducement used here and in the pattern instructions, expressly tells the jury that the proscribed intent is the intent to engage in sexual activity with a minor. Contrary to the government's suggestion, *that* is the context in which the instruction is most naturally understood. Indeed, it is axiomatic that juries are presumed to follow the instructions they receive. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)) ("A jury is presumed to follow instructions."). Thus, the context here suggests the jury was misinformed about the required *mens rea*.[3]

Equally unavailing is the government's alternative argument that the district court did not abuse its discretion in deciding not to instruct on the assent requirement because it was

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[2] The government states that the decision below "expressly reaffirmed *Lee*'s interpretation of Section 2422(b)." BIO at 15. That statement is misleading. The decision below cited *Lee* when discussing the sufficiency of the evidence, but not when discussing the jury instruction issue. *See* Pet. at 20–31. As explained in Mr. Brooks' petition, the Court simply stated the pattern instruction is consistent with *Murrell*. *Id.* In its analysis, the Court did not once mention *Lee*, the requirement of assent, or the fact that the instructions expressly advised the jury that the intent proscribed is the intent to engage in sex with a minor.

[3] In support of its contextual argument, the government also argues that the context is clear because the "instructions referred to the defendant's inducement (i.e. causation) of 'an *individual* to engage in sexual activity' . . . not inducement of sexual activity itself." However, a defendant can induce an *individual* to engage in sex or to assent to engage in sex. The government's argument in this respect is nonsensical.

"confusing." BIO at 14. Although it is true that the district court has discretion in how to word an instruction, that discretion does not allow a court to inaccurately advise the jury about an offense's required *mens rea*. Because the instruction here clearly misadvised the jury about the required intent for Mr. Brooks' offense, the district court abused its discretion by giving it.[4]

II. The Circuits are Split, and Even if they Were Not, this Court's Intervention is Needed

Contrary to the government's assertion, there is tension between the circuits about the *mens rea* required for a § 2422(b) attempted inducement charge. *See* BIO at 15. Although the intent proscribed in the Eleventh Circuit is the intent to cause a minor's assent to sexual activity, other circuits have taken a different view. For example, the District of Columbia Circuit has held that proscribed intent is more than merely causing assent—a defendant must transform or overcome the will of a minor. *United States v. Hite*, 769 F.3d 1154, 1164 (D.C. Cir. 2014) ("[W]e reject the Government's argument that § 2422(b) does not require the defendant to attempt to transform or overcome the minor's will."); *id.* at 1167 ("Although the word "cause" is contained within some definitions of " induce," cause encompasses more conduct; simply "to cause" sexual activity with a minor does not necessarily require any effort to transform or overcome the will of the minor."). Thus, contrary to the government's suggestion, there is significant tension in the circuits about the *mens rea* proscribed for this offense.

That said, even if this were purely an Eleventh Circuit issue, this Court's intervention would still be warranted. As explained above, the Eleventh Circuit's pattern instruction advises

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[4] Additionally, the government points out that the district court's decision to not give the instruction on the assent requirement was based, in large part, on the fact that this case concerned an adult intermediary. BIO at 14. However, as the government also notes, the parties agree that this offense may be committed where a defendant communicates only with an adult intermediary. BIO at 9. Thus, whether this offense may be committed through an adult intermediary does not implicate the question presented here about the proscribed *mens rea* for this offense.

juries to convict defendants of attempted inducement under § 2422(b) so long as the defendant intended to have sex with a minor. But that is not the proscribed intent. Mr. Brooks and others have urged the Eleventh Circuit to revisit the issue en banc, but the Eleventh Circuit has declined. *See* Pet. at 33. Absent this Court's intervention, defendants in Florida, Georgia, and Alabama will continue to be sentenced to a harsh 10-year mandatory minimum sentence based on conduct that may not be proscribed by federal law. Mr. Brooks urges this Court to resolve the tension in the lower courts and resolve this important question of federal law. Sup. Ct. R. 10.

III. This Case is an Ideal Vehicle

In a last ditch effort to evade this Court's review, the government argues that Mr. Brooks' case present a poor vehicle to review this issue because: (1) no "reasonable possibility" exists that a correctly worded instruction would have changed the outcome; and (2) the jury found Mr. Brooks guilty even after he argued in closing that the government needed to prove assent. BIO at 15–17. The government's arguments are unsound.

First, the government misapprehends the standard it would have to satisfy to show harmlessness. It is not a mere "reasonable possibility." BIO at 16. As explained in Mr. Brooks' petition, the government would have to show the error was "harmless beyond a reasonable doubt." *See* Pet. at 11 (citing *Neder v. United States*, 527 U.S. 1, 17, 19 (1999)). "Harmless beyond a reasonable doubt" is a much more a daunting obstacle than a mere "reasonable possibility." Indeed, the government does not state the correct standard once, let alone attempt to explain how it can overcome it. The government's strategic decision not to face this standard head-on only goes to show that Mr. Brooks is correct when he states this case is an ideal vehicle for this Court's review.

In its final paragraph, the government also suggests this case would be a poor vehicle because Mr. Brooks was able to argue in closing that the government was required, and failed, to prove he intended to cause a minor's assent to sexual activity. BIO at 16–17. However, during closing argument, the government argued the opposite—that he should be convicted for intending to have sex with a minor. *See* Pet. at 8 ("During closing argument, the government argued that this case 'falls squarely within the definition of inducement' because Mr. Brooks 'attempted to stimulate or cause a minor *to engage in sexual activity*.' The government concluded by stating that Mr. Brooks was willing to meet a child for sex 'and that is the crime [he] has committed' and why the jury 'should find him guilty.'"). More importantly, as noted above, juries are presumed to follow the instructions they are given. *Weeks*, 528 U.S. at 234 (citing *Richardson*, 481 U.S. at 211). Here, the jury was clearly instructed that Mr. Brooks should be found guilty if he intended to engage in sexual activity with a minor, and the government argued the same in closing. That the jury returned a guilty verdict does not mean they rejected Mr. Brooks' argument about the requirement of assent, it simply means they followed the district court's instructions. And because the instructions were erroneous as a matter of law, this case is an ideal vehicle for resolving the question presented by Mr. Brooks' petition.

CONCLUSION

For the reasons stated above and in his petition, Mr. Brooks respectfully requests that this Court grant his petition.

Respectfully submitted,

Donna Lee Elm
Federal Defender

Conrad Benjamin Kahn
Research and Writing Attorney
Federal Defender's Office
201 S. Orange Avenue, Suite 300
Orlando, FL 32801
Telephone: (407) 648-6338
Facsimile: (407) 648-6765
E-mail: Conrad_Kahn@fd.org
Counsel of Record for Mr. Brooks