No. 18-6755

IN THE SUPREME COURT OF THE UNITED STATES

DAEDERICK LACY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether in a prosecution for transporting a minor to engage in prostitution or other criminal sexual activity, in violation of 18 U.S.C. 2423(a), the government is required to prove that the defendant knew the victim's minor status.

2. Whether in such a prosecution the government is required to prove not only that the criminal sexual activity was the dominant purpose of bringing the minor, but also that it was the dominant purpose of the travel itself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 904 F.3d 889.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2018. The petition for a writ of certiorari was filed on November 15, 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 District of Kansas, petitioner was convicted on one count

of sex trafficking of a minor, in violation of 18 U.S.C. 1591(a)(1) and (b)(2) (Supp. V 2017); one count of sex trafficking accomplished by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1) and (b)(1) (Supp. V 2017); and one count of transporting a minor to engage in criminal sexual activity, in violation of 18 U.S.C. 2423(a). Judgment 1; Pet. App. 1-2. The district court sentenced petitioner to 293 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3; Pet. App. 2. The court of appeals affirmed. Pet. App. 1-22.

1. This case concerns petitioner's illicit relationships with three young women in November and December 2015. In November 2015, petitioner started a relationship with B.J., a 16-year-old girl, via Facebook. D. Ct. Doc. 50, at 3 (May 9, 2017). Shortly thereafter, petitioner "began posting advertisements for B.J. on Backpage.com, suggesting that B.J. would perform 'sex acts for money.'" Ibid. Over the course of the next month, individuals would contact petitioner in response to those advertisements, petitioner "would drive B.J. to the 'call,'" where B.J. would engage in prostitution with the client, and B.J. would hand over to petitioner the money she had been paid. Id. at 3-4.

Petitioner also contacted S.G., a different young woman who was not a minor, via Facebook during the same time period, promising her "more than $500,000 in income if she would agree to work for him, possibly as a model." D. Ct. Doc. 50, at 5. When

S.G. met petitioner in person, petitioner took her phone and her car keys and, using pictures from her phone, posted a similar advertisement for her on Backpage.com. Ibid. Petitioner "then told S.G. that she had a client, and he drove her to a hotel to meet the client, at which point S.G. engaged in a sex act with the client in exchange for money, which she provided to [petitioner] after the encounter." Ibid. S.G. later testified that she engaged in the sex act because she "had lost [her] control." Id. at 6.

Finally, petitioner established a relationship with S.B., a 17-year-old girl, during the same time period. D. Ct. Doc. 50, at 7-8. Like the other victims, S.B. engaged in prostitution at petitioner's direction in Wichita, Kansas. Id. at 8; see Pet. App. 14-15. Then, in early December 2015, petitioner borrowed a friend's car. D. Ct. Doc. 50, at 8. Petitioner told his friend that he "'need[ed] a week max to stack'" -- i.e., make money -- "'and lay low.'" Id. at 8-9 (brackets in original). On December 7, 2015, police pinged petitioner's cell phone and located it near a hotel in Mesquite, Texas. Pet. App. 16. Upon arriving at the hotel, police found the borrowed car parked nearby, and discovered S.B. in a hotel room, as well as a receipt for condoms indicating that petitioner had purchased them in Wichita five days earlier. Ibid.

2. A federal grand jury in the District of Kansas returned an indictment charging petitioner with one count of sex trafficking

of a minor, in violation of 18 U.S.C. 1591(a)(1) and (b)(2) (Supp. V 2017) (Count 1); one count of sex trafficking accomplished by force, fraud, or coercion, in violation of 18 U.S.C. 1591(a)(1) and (b)(1) (Supp. V 2017) (Count 2); and one count of transporting a minor to engage in criminal sexual activity, in violation of 18 U.S.C. 2423(a) (Count 3). Indictment. Petitioner proceeded to trial and was convicted on all three counts. Judgment 1. The court of appeals affirmed. Pet. App. 1-22.

As relevant here, the court of appeals rejected petitioner's argument that his conviction on Count 3 must be vacated on the theory that the government had been required to prove that he knew that S.B. was a minor. Pet. App. 11-14. Section 2423(a) prohibits "knowingly transport[ing] an individual who has not attained the age of 18 years in interstate or foreign commerce * * * with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. 2423(a). Joining every other court of appeals to have considered the issue, the court determined that a conviction under Section 2423 does not require proof that the defendant knew the victim's minor status. Pet. App. 11-12.

The court of appeals explained that whether a mens rea requirement applies to a particular element of the offense is a "'contextual' inquiry." Pet. App. 13 (quoting Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009)). Here, it observed that

the age of the victim is not "the crucial element separating legal innocence from wrongful conduct," because "the conduct prohibited by [Section] 2423(a)" -- transporting an individual across state lines for the purpose of prostitution -- is unlawful under 18 U.S.C. 2421 regardless of the victim's age. Pet. App. 12 (citations omitted). And the court reasoned that, given the evident "'congressional intent that minors receive special protection against sexual exploitation,' it [wa]s appropriate for the 'defendant -- who would presumably know he is treading close to the line in transporting a young person to engage in illicit sexual activity -- to bear the risk that the person transported is underage.'" Pet. App. 13 (brackets and citation omitted).

The court of appeals also rejected petitioner's argument that his conviction must be vacated on the theory that the government was required to prove that the primary purpose of his interstate travel was prostitution. Pet. App. 19-22. "Section 2423(a)," the court observed, "is concerned not with why a defendant travels, but rather with the question why he transports a minor." Id. at 20 (citation omitted). The court thus determined that the government is required to prove only that "the illicit sexual activity was a dominant purpose for transporting the minor in interstate travel," not for the travel itself. Ibid. The court explained that, "even if a defendant's primary purpose for the trip itself is to conduct legitimate business or to leave a

particular state, his conviction may be sustained if one of his motivating or dominant reasons for bringing a minor with him on the trip is for illicit sexual activity." Ibid. And it found the evidence sufficient to allow the jury to conclude that petitioner's dominant purpose for transporting S.B. to Texas was "to continue using her as a source of income there" -- i.e., prostitution. Id. at 21-22.

ARGUMENT

Petitioner renews his contentions (Pet. 15-23) that his conviction for transporting a minor to engage in criminal sexual activity, in violation of 18 U.S.C. 2423(a), required proof that he knew S.B. was a minor at the time he transported her and that the dominant purpose of his interstate travel was to transport S.B. to engage in prostitution. The court of appeals correctly rejected both contentions. Its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Under 18 U.S.C. 2423(a), it is a crime to "knowingly transport[] an individual who has not attained the age of 18 years in interstate or foreign commerce * * * with intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." Every court of appeals to consider the question has determined that, while Section 2423(a) applies only if the individual who was

knowingly transported across state lines to engage in criminal sexual activity was a minor, the government is not required to prove that the defendant knew of the victim's minor status. See United States v. Tavares, 705 F.3d 4, 18-20 (1st Cir.), cert. denied, 569 U.S. 986, and 571 U.S. 964 (2013); United States v. Griffith, 284 F.3d 338, 350-351 (2d Cir.), cert. denied, 537 U.S. 986 (2002); United States v. Hamilton, 456 F.2d 171, 173 (3d Cir.) (per curiam), cert. denied, 406 U.S. 947 (1972); United States v. Washington, 743 F.3d 938, 943 (4th Cir. 2014); United States v. Daniels, 653 F.3d 399, 410 (6th Cir. 2011), cert. denied, 565 U.S. 1138 (2012); United States v. Cox, 577 F.3d 833, 836-838 (7th Cir. 2009); United States v. Taylor, 239 F.3d 994, 997 (9th Cir. 2001). The court of appeals correctly reached the same conclusion here.

As this Court has recognized, "many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor." Flores-Figueroa v. United States, 556 U.S. 646, 653 (2009). Congress enacted Section 2423(a) alongside another provision that already prohibits "knowingly transport[ing] any individual in interstate or foreign commerce * * * with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. 2421 (emphasis added). The evident congressional purpose of specifically prohibiting the same conduct with respect to minors, and attaching a higher sentencing range,

was to "provide heightened protection for minors against sexual exploitation." Cox, 577 F.3d at 837; see also Taylor, 239 F.3d at 997. Given the difficulties in proving a defendant's knowledge of the victim's age, the courts of appeals have recognized that Section 2423(a) is correctly interpreted as "requiring a defendant -- who would presumably know he is treading close to the line in transporting a young person to engage in illicit sexual activity -- to bear the risk that the person transported is underage." Daniels, 653 F.3d at 410; see Taylor, 239 F.3d at 997 ("Ignorance of the victim's age provides no safe harbor from the penalties in 18 U.S.C. § 2423(a).").

Petitioner contends that "courts ordinarily read a phrase in a statute that introduces the elements of a crime with the word 'knowingly' as applying the word to each element." Pet. 16 (quoting Flores-Figueroa, 556 U.S. at 652). But petitioner acknowledges that no "rigid rule" to that effect exists, and that the inquiry into whether "knowingly" applies to a particular element of an offense "'is a contextual one.'" Pet. 18 (quoting Flores-Figueroa, 556 U.S. at 652). As noted, "sex crimes involving minors" is a context in which "knowingly" ordinarily does not apply to a victim's minor status. Flores-Figueroa, 556 U.S. at 653. And the more specific context of Section 2423(a) reinforces that general rule. See pp. 7-8, supra. Unlike in United States v. X-Citement Video, Inc., 513 U.S. 64 (1994), the minor victim's age

in Section 2423(a) is not "the crucial element separating legal innocence from wrongful conduct," id. at 73; the transportation for illicit sexual purposes is illegal either way, see 18 U.S.C. 2421, 2423(b).

As petitioner acknowledges (Pet. 17), Justice Alito specifically addressed 18 U.S.C. 2423(a) in his Flores-Figueroa concurrence, noting with approval the courts of appeals' uniform recognition "that a defendant need not know the victim's age to be guilty under this statute." 556 U.S. at 660 (citing, e.g., Griffith, supra, and Taylor, supra). Justice Alito relied on Section 2423(a) as his primary evidence that, while it may be "fair to begin with a general presumption that the specified mens rea applies to all the elements of an offense, * * * it must be recognized that there are instances in which context may well rebut that presumption." Ibid. The majority did not disagree. See id. at 652 ("As Justice Alito notes, the inquiry into a sentence's meaning is a contextual one.").

Petitioner also errs in suggesting (Pet. 15) that the general common-law presumption of a scienter requirement for criminal offenses compels a different result. Whatever application the common-law presumption might otherwise have, this Court has noted that the presumption did not include "sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached the age of

consent." Morissette v. United States, 342 U.S. 246, 251 n.8 (1952). In such cases, "the perpetrator confronts the underage victim personally and may reasonably be required to ascertain that victim's age." X-Citement Video, 513 U.S. at 72 n.2. The same is true here.[1]

2. Petitioner also contends that his conviction must be vacated because the government did not prove that "the dominant purpose of [his] trip" to Texas was for S.B. to engage in prostitution. Pet. 21 (citing Mortensen v. United States, 322 U.S. 369, 374 (1944)); see id. at 20-23. But Section 2423(a) does not prohibit traveling interstate with a particular purpose; it prohibits "transport[ing] an individual who has not attained the age of 18" in interstate travel "with the intent that the individual engage in prostitution." 18 U.S.C. 2423(a) (emphasis added). Thus, as the court of appeals explained, the question under Section 2423(a) is not the purpose of the interstate travel itself, but the purpose of the transportation of the minor during that travel. See Pet. App. 20-21; see also United States v.

[1] After this petition was filed, the Court granted review in Rehaif v. United States, No. 17-9560, cert. granted (oral argument scheduled for Apr. 23, 2019), to consider whether, in a prosecution against an alien unlawfully in the United States who possesses a firearm, see 18 U.S.C. 922(g)(5)(A), 924(a)(2), the government must prove that the defendant knew that he was unlawfully in the United States. Petitioner has not since requested that the Court hold this petition pending its decision in Rehaif. And given the different contexts in which the mens rea questions arise, no hold is necessary.

Vargas-Cordon, 733 F.3d 366, 377 (2d Cir. 2013) ("Section 2423(a) is concerned not with why a defendant travels, but rather with the question why he transports a minor."); United States v. Snow, 507 F.2d 22, 24 (7th Cir. 1974) ("[W]hen examining defendant's purpose, the appropriate inquiry is not merely his reason for making the trip but, more precisely, his reason for taking a female companion with him."). And, here, the court of appeals found sufficient evidence that "the illicit sexual activity was a dominant purpose for transporting the minor in interstate travel." Pet. App. 20; see id. at 21-22.

Petitioner relies (Pet. 20-21) on the Court's statement from Mortensen v. United States, supra, that, under a predecessor to Section 2423(a), "[a]n intention that the women or girls shall engage in the conduct outlawed by [the statute] * * * must be the dominant motive of [the] interstate movement." 322 U.S. at 374. That statement referred to "interstate movement" with minors, not the defendant's travel in itself. As the preceding sentence made clear, the "essential" requirement was "that the interstate transportation have for its object or be the means of effecting or facilitating the proscribed activities." Ibid. (emphasis added). As petitioner recognizes (Pet. 20-21), "[t]he sole purpose of the journey" in Mortensen "from beginning to end was to provide innocent recreation and a holiday for" the defendants and two of their minor employees. 322 U.S. at 375. "It was a complete break

or interlude in the operation of [the defendants'] house of ill fame and was entirely disassociated therefrom." Ibid. The Court had no occasion to consider, and did not hold, that a defendant like petitioner, who brings along a minor for purposes of illicit sexual activity, may avoid conviction under Section 2423(a) because he might have made the journey by himself anyway.[2]

Petitioner also errs in relying (Pet. 21) on United States v. McGuire, 627 F.3d 622 (7th Cir. 2010). McGuire involved a prosecution not under Section 2423(a), but the neighboring provision in Section 2423(b). Unlike Section 2423(a), Section 2423(b) specifically prohibits "travel[ing] in interstate commerce * * * with a motivating purpose of engaging in any illicit sexual conduct with another person." 18 U.S.C. 2423(b). That is, "it punishes travel in interstate commerce even if no minor is transported, if the purpose of the travel is sex with a minor." McGuire, 627 F.3d at 624. In McGuire, the defendant brought a minor with him on various legitimate business trips with the intention of sexually molesting the minor while on those trips. Id. at 622-623; see id. at 625 (explaining that the defendant "travel[ed] in interstate or foreign commerce to a retreat in the

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[2] Hansen v. Haff, 291 U.S. 559 (1934), did not directly involve a statute proscribing transportation of another person and thus is not controlling here. That case considered whether an alien who had traveled from California to Denmark and back with a married man was deportable as a "person[] coming into the United States for the purpose of prostitution or for any other immoral purpose." Id. at 560 (quoting 8 U.S.C. 136 (1934)).

company of a boy he intend[ed] to molest"). The Seventh Circuit viewed the government's decision to charge the defendant only under Section 2423(b) to present a difficult question whether travel with such "dual purposes" violated Section 2423(b). Id. at 624. The Seventh Circuit did not suggest, however, that alternative purposes for the interstate travel and having a minor accompany the defendant during that travel would present difficulties under Section 2423(a). To the contrary, the Seventh Circuit found it readily "apparent" that if the defendant in McQuire had committed the conduct he was accused of, he had violated Section 2423(a). Ibid.; see Snow, 507 F.2d at 24. Indeed, petitioner has not identified any decision of another court of appeals holding that Section 2423(a) would not apply in a case like his.

Finally, to the extent defendant seeks (Pet. 22-23) this Court's review of the court of appeals' determination that the evidence was sufficient for a reasonable jury to find that a dominant purpose in his transporting S.B. to Texas (as opposed to his purpose in traveling to Texas at all) was, in fact, for S.B. to engage in prostitution, that factbound determination does not warrant further review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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