No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

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MARTAVIOUS DETREL BANKS KEYS,
*Petitioner*

v.

UNITED STATES OF AMERICA,
*Respondent*

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

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. This Court should grant certiorari in this case to answer to resolve a division in the case law and an important question of double jeopardy jurisprudence: whether the Fifth Circuit violated this Court's holding in *Bell v. United States*, 349 U.S. 81 (1955), that there must be a showing of congressional intent to impose multiple punishments in a single trial for violations of separate subsections of a single statute.

II. This Court should grant certiorari in this case to correct the Fifth Circuit's erroneous and dangerous finding that law enforcement officers and agents can testify that in their opinion the defendant committed all the elements of the offense, including the *mens rea* elements.

## PARTIES

Martavious Keys is the Petitioner; he was the defendant-appellant below.

The United States of America is the Respondent; it was the plaintiff-appellee below.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Martavious Keys respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *United States v. Martavious Keys,* No. 17-10746, and is provided in the Appendix to the Petition. [Appx. A]. The district court entered judgment on June 23, 2017, which judgment is attached as an Appendix. [Appx. B].

## JURISDICTIONAL STATEMENT

The instant Petition is filed within 90 days of an opinion affirming the judgment, which was entered on August 20, 2018. *See* SUP. CT. R. 13.1. This Court's jurisdiction to grant *certiorari* is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

**18 U.S.C. § 1591 provides in pertinent part:**

> (a) Whoever knowingly–
> (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
> (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or . . . in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to en-gage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is~
(1) if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or
(2) if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

**The Fifth Amendment to the United States Constitution provides**:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Federal Rule of Evidence 704 states as follows**:

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

## STATEMENT OF THE CASE

### A. Trial Court Proceedings

On October 6, 2014, the government filed a superseding indictment charging Martavious Keys in counts one and two with sex trafficking of children, in violation of 18 U.S.C. §§ 1591(a) & (b)(2), and in count three with sex trafficking by force, fraud or coercion, in violation of 18 U.S.C. §§ 1591(a) & (b)(1) & (2).

Mr. Keys filed the following pretrial motions pertinent to this petition:

- Motion to Dismiss Count One to Avoid Multiplicity,
- Motion to Exclude testimony of Detective Del Fierro and Agent Campbell (ROA.126-31);

A pretrial conference was held on February 6, 2017, the court carried Mr. Keys's motion to dismiss count one for multiplicity at which, but denied defendant's motions to exclude the experts. to dismiss for vagueness, and for a bill of particulars.

At trial, the theory of the defense was the alleged victims had a plan to engage in prostitution before they even met Mr. Keys, and thus there was no force or coercion, the alleged victims were not credible due to drug use and psychological issues, and that Mr. Keys could not have been aware of their ages.

One alleged victim, Jane Doe 2, testified as follows: in March of 2015 she, along with Jane Doe 1, resided at the Nexus Recovery center, which is a drug rehabilitation center. Jane Doe 2 was 14 at the time. The two Janes became friends and made a plan to, and did in fact, run away from the rehab center. Jane Doe 1 did not have shoes on, so they went to a Walmart and a man bought her shoes, and then they went to a gas station, approached some men, and went they men to the men's

apartment, and had consensual sex with the men, because the Janes wanted drugs. They stayed at that apartment for three days, and met Mr. Keys while they were there. Jane Doe 2 told the men she was 18 and they appeared to believe her.

At some point, Jane Doe 1, Mr. Keys and one of the men made a plan for them all to meet up at a different location. They did meet up, and the two Janes left the other men and joined Mr. Keys. The Janes then went to Mr. Keys's apartment. Jane Doe 1 made the decision that they would go with Mr. Keys. Shortly after men began to show up to have sex with the two Janes, as a result of a Backpage ad set up, apparently, by Mr. Keys. Jane Doe 2 never saw Mr. Keys post an ad. Jane Doe 1 directed Jane Doe 2 to get naked when the men arrived, the men would choose between the Janes, and Jane Doe 1 would take the money and pass it under a door to Mr. Keys. Jane Doe 1 taught Jane Doe 2 how to be a prostitute, told Jane Doe 2 to answer the door naked, and advised Jane Doe 2 on how to perform.

Jane Doe 2 had sex with men for money about ten times during this time. Jane Doe 1 had sex with men for money more often than did Jane Doe 2. Jane Doe 1 forced, pushed, or told Jane Doe 2 to have sex with men during this time. *Id.* Jane Doe 2 told Mr. Keys how old she was. Mr. Keys continued to cause Jane Doe 2 to have sex with men after she told Mr. Keys her age. Jane Doe 2 was at Mr. Keys apartment for about two weeks. Mr. Keys was not at the apartment for a couple of days during those two weeks, but he had friends there at his apartment. Jane Doe 2 could have left out the front door at least during this time.

Jane Doe 2 willingly used drugs at first, but one time Jane Doe 1 yelled at Jane Doe 2 to make her do drugs. Jane Doe then had consensual sex with Mr. Keys, but it became non-consensual.

Another time, Mr. Keys choked Jane Doe in response to expressing that she no longer wanted to participate any longer.

Jane Doe 2 was experiencing hallucinations during this time.

Jane Doe 2 left the residence with a customer, never to return.

Jane Doe 1 testified as follows: in March of 2015 she was 15 years old. She met Jane Doe 2 while there were both at the Nexus drug rehab. They both ran away and went to a Walmart because Jane Doe 2 had no shoes. Jane Doe 1 planned to make money by engaging in prostitution once she left the rehab. She asked a man where to locate the "track" (a road where prostitutes walk for customers to find them). They then tried to find drugs and went to a gas station and met some older men who accommodated them. They stayed with the men for two or three days and did drugs. They told the men they were 17, but then that they were 15, and they had sex with the men. Jane Doe 1 became angry at Jane Doe 2 for not having sex with the men, forced Jane Doe 2 to have sex with one of the men, and forced Jane Doe 2's head into the sex organ of one of them until Jane Doe 2 threw up.

At some point Mr. Keys came to the apartment. The two Janes later went the Mr. Keys, and he paid the other man some money. Jane Doe 1 wanted to go with Mr. Keys. *Id.* Mr. Keys gave them drugs. Mr. Keys advertised the Janes on Backpage for prostitution, customers would call, and he would tell Jane Doe 1 what to say and what to charge. Mr. Keys used prepaid phones. Jane Doe 1 then would have sex for money approximately 16 times per day. Jane Doe 1 would get the money from the customers and slide it under the door of the bathroom to Mr. Keys. Jane Doe 1 told Mr. Keys that she was 15, and that Jane Doe 2 was 14, at the time. Mr. Keys left for a few days, and his

friends came to the house. Jane Doe 1 did not feel free to leave. Jane Doe 1 saw Mr. Keys choke Jane Doe 2.

Jane 1 also testified that Mr. Keys did not prevent Jane Doe 2 from ultimately leaving for good with a customer, who apparently gave some marijuana to Mr. Keys. Jane Doe 2 had been with Mr. Keys for a week or two. A parole officer regularly visited a resident at the house and Jane Doe 1 said nothing to the officer. Jane Doe 1 was with Mr. Keys for approximately one month. For part of the time Jane Doe 1 worked and lived in a hotel and a motel. At some point Jane Doe 1 left Mr. Keys. When Jane Doe 1 spoke with the police she was concerned about what might happen to her because of the things she did to Jane Doe 2.

Kevin Halbert testified that at the time of the investigation of the offense he was a detective with the Mesquite Police Department assigned to crime against persons unit. He interviewed Mr. Keys. He testified that Mr. Keys "admitted to me during the course of this interview that he did know the girls, they did stay with him, they did prostitute, and he found out that they were underage." Det. Halbert testified that Mr. Keys told him that the girls they did not look their age, they looked like adults, once he found out their age he had the girls leave, and never admitted using force or coercion. Det. Halbert gave the following conclusions to the jury about Mr. Keys' veracity or guilt:

- Mr. Keys minimized his role;
- Mr. Keys wasn't honest:
- Mr. Keys "[a]bsolutely" "compelled Jane Doe 1 to engage in prostitution through force, fraud, or coercion";

- Mr. Keys compelled Jane Doe 2 to engage in prostitution through force, fraud, or coercion:

- Mr. Keys was lying when he said he "got rid of the girls" once he learned their ages:

- Mr. Keys was lying when he said that he had not tried to get Jane Doe 1 back after she left.

Another witness, Detective Campbell, was also allowed to tell the jury that he believed Mr. Keys was guilty of sex trafficking. Det. Campbell also testified that

- he too did "believe that the defendant Martavious Detrel Banks Keys caused Jane Doe 1 and Jane Doe 2 to engage in commercial sex acts in the Northern District of Texas,"

- "the defendant either knew or had a reasonable opportunity to observe Jane Doe 1 and Jane Doe 2 during that time period,"

- and that "absolutely" "the defendant caused Jane Doe 1 to engage in commercial sex acts by force, fraud, or coercion."

The jury returned a guilty verdict as to all three counts. The district court sentenced Mr. Keys to life imprisonment, five years of supervised release, and a special assessment of $100 on each of the three counts to be run concurrently.

**B. Circuit Court Proceedings**

Petitioner appealed his sentence and presented the following two issues:

I. The district court erred when it denied the defendant's motion to dismiss for multiplicity or double jeopardy, and entered a judgment and sentence for both counts one and three.

II. The trial court plainly erred when it allowed two case agents to tell the jury that they believed the defendant was guilty, and that he was lying when he made assertions to the contrary.

The court of appeals ruled against Mr. Keys and affirmed. *See* Appx. A.

## REASONS FOR GRANTING THE WRIT

**I. This Court should grant certiorari in this case to answer to resolve a division in the case law and an important question of double jeopardy jurisprudence: whether the Fifth Circuit violated this Court's holding in *Bell v. United States*, 349 U.S. 81 (1955), that there must be a showing of congressional intent to impose multiple punishments in a single trial for violations of separate subsections of a single statute.**

*Introduction.*

Mr. Keys was charged twice and convicted twice of sex trafficking one person. The question is whether that violates the double jeopardy clause and the rule against multiplicity in the charging document.

The Fifth Circuit ruled that the *Blockburger* test determines the outcome. *See,* Appx. A, p. 10. Instead of determining whether Congress clearly and without ambiguity intended for a single transaction to result in multiple offenses, the Fifth Circuit divined Congressional intent from ambiguous sources. *Id.*. This holding directly contradicts this Court's holding in *Hunter,* where the explicitly held Court that the *Blockbuger* test does not apply in a single trial case. In a single trial of two provisions "the question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed." *Id.* At 368.

Indeed, this Court stated in *Bell v. United States, 349 U.S. 81 (1955)*, in which it reversed separate punishments for transporting separate women on one trip in violation of the "Mann Act," the statute must be construed to prohibit double punishments unless Congress has made it clear that it intended double punishment, or made it clear what the unit of prosecution was. In the words of the Court:

> When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment. This in no wise implies that language used in criminal statutes should not be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read. Nor does it assume that offenders against the law carefully read the penal code before they embark on crime. It merely means that **if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes.**

*Bell,* 349 U.S. at 81 (emphasis added). In sum, "[w]hen the government seeks to prove that a single act or occurrence results in multiple violations of the same statute, the rule of lenity requires only one punishment absent a showing of legislative intent to impose multiple punishments." *Double Jeopardy*, 40 Geo. L.J. Ann. Rev. Crim. Proc. 470, 491–92 (2011).

Contrary to the Fifth Circuit, the other courts to have decided this issue have all held that Congress intended the unit of prosecution to be the trafficking of a person. Each person is the unit of prosecution. *See, Madkins v. United States,* No. 3:08-CR-343-J-34MCR, 2014 WL 4417849, at *23 (M.D. Fla. Sept. 8, 2014), (citing *United States v. Jones,* 2007 WL 2301420 at *9–10 (N.D.Ga. July 18, 2007) (Congress unambiguously made each "person" the allowable unit of prosecution); and *United States v. Cameron,* 84 F.Supp. 289, 290 (S.D.Miss.1949). Section 1591(a)(1) does not include two distinct offenses. The jury can return a verdict on either the use of force, fraud, or coercion or because a victim is underage. *See United States v. Willoughby*, 144 F. Supp. 3d 935, 940 (N.D. Ohio 2015).

Thus, review should be granted to correct this error by the Fifth Circuit, to resolve the division in the case law, and to ultimately decide the double jeopardy test for single prosecutions.

## II. This Court should grant certiorari in this case to correct the Fifth Circuit's erroneous and dangerous finding that law enforcement officers and agents can testify that in their opinion the defendant committed all the elements of the offense, including the *mens rea* elements.

In the words of the Fifth Circuit, this was the testimony from the case agent and another law enforcement officer that was allowed to be presented to the jury:

> Halbert engaged in the following exchanges with the prosecutor at trial: 1) when asked, "[b]ased on all the information that you learned during your investigation, the entirety of it, did you believe that Jane Doe 1 had been compelled to engage in commercial sex acts through force, fraud, or coercion?" he responded, "[a]bsolutely"; 2) when asked "did you believe that the defendant, based on your investigation, had an opportunity to observe these girls?" he responded, "[a]bsolutely"; 3) when asked "did you believe, based on your investigation, that Jane Doe 2, being 14 at the time, was compelled to engage in commercial sex acts?" he responded, "[s]he was"; and 4) when asked "who do you believe compelled them to engage in those commercial sex acts?" he responded "[t]he defendant, Mr. Keys."
>
> Similarly, Campbell had the following exchange with the prosecutor: 1) when asked, "[b]ased on your investigation in this case, do you believe that the defendant . . . caused Jane Doe 1 and Jane Doe 2 to engage in commercial sex acts in the Northern District of Texas?" he responded "I do"; 2) when asked "do you believe that the defendant either knew or had a reasonable opportunity to observe Jane Doe 1 and Jane Doe 2 during that time period?" he responded "I believe he did"; and 3) when asked "[d]o you believe that the defendant caused Jane Doe 1 to engage in commercial sex acts by force, fraud, or coercion?" he responded "[a]bsolutely."

Appx. A, pp. 15-16. The Fifth Circuit found this to be proper. *Id.* pp.16-17.

If the Fifth Circuit's opinion is allowed to stand, officers will routinely be allowed to opine to the jury that in their opinion the defendant has committed each element of the offense, i.e, that he or she, in the officer's opinion is guilty. That is what was found to be proper in this case. This is

not, cannot, and should not be the law. No other Circuit and not even the Fifth Circuit (previously) has allowed such testimony.

"The Advisory Committee notes make it clear that questions which would merely allow the witness to tell the jury what result to reach are not permitted." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) "A witness . . . may not give a direct opinion on the defendant's guilt or innocence." *United States v. Kinsey*, 843 F.2d 383,388, (9th Cir. 1988); *see, also United States v. Windfelder*, 790 F.2d 576, 582 (7th Cir.1986) (Error to allow Internal Revenue Service agent to testify that defend-ant "intentionally understated his income" in his income tax return and that "he was well aware of what happened to [his aunt's] assets prior to her dying.").

The Fifth Circuit itself has stated: "a witness' expression as to the guilt of a particular defendant would be a legal conclusion, against which we have previously cautioned courts to 'remain vigilant.' *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977), *United States v. Masson*, 582 F.2d 961, 963 (5th Cir. 1978). The D.C. circuit has stated: "a direct opinion on guilt or innocence would be barred . . ." *United States v. Boney*, 977 F.2d 624, 630 (D.C. Cir. 1992).

Again the Fifth Circuit previously had found plain error where a district court, as in this case, allowed an agent to tell the jury that in the agent's conclusion that the defendant was guilty. *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 366 (5th Cir. 2010). In the words of this Court:

> Pure and simple, Agent Crawford offered an expert opinion that Gonzalez-Rodriguez must have known he was carrying drugs because he falsified the Freightliner's log book. The jury was free to determine for itself whether Gonzalez-Rodriguez falsified the log book and, if so, whether this suggested knowledge of drugs. It was plain error, however, for Agent Crawford to draw the connection. See Fed.R.Evid. 704(b) (providing that "ultimate issues are matters for the trier of fact

alone"); see also [*United States v. Gutierrez-Farias*, 294 F.3d 657, 662-63 (5th Cir. 2002).]

*Id. See, also, United States v. Mendoza–Medina*, 346 F.3d 121, 128 (5th Cir.2003); *United States v. Hernandez-Acuna*, 202 F. App'x 736, 740–41 (5th Cir. 2006)

As on court has stated: "seldom will be the case when a lay opinion on an ultimate issue will meet the test of being helpful to the trier of fact." *Mitroff v. Xomox Corp.,* 797 F.2d 271, 276 (6th Cir. 1986).

The First Circuit, citing *Mitroff,* found it to be error to allow testimony that the defendant had not told the truth. *United States v. Sanabria*, 645 F.3d 505, 515-16 (1st Cir. 2011).

And, since the officers were not offered as experts, it is important to note that, as stated in a treatise on evidence, "a lay witness's purpose is to inform the jury what is in the evidence, not tell it what inferences to draw from that evidence." Michael H. Graham, Handbook of Federal Evidence, 7th ed., Vol. 7, § 704:1, n.22, citing *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004). As stated in *Grinage* if courts were to allow testimony, such as in Mr, Keys's case, to testify to their conclusions about the defendant's guilty, "there would be no need for the trial jury to review personally any evidence at all." *Id.* at 750; accord, *United States v. Garcia*, 413 F.3d 201, 213-14 (2d Cir. 2005).

Nor can a witness testify as to the credibility of other witnesses. See, Handbook, id., n.24, citing numerous cases.

The error to allow the two officers to testify that they believed the defendant was guilty and that his assertions to the contrary were untruthful was clear and obvious. The plain error affected Mr. Keys' substantial right to a fair trial, and seriously affected the fairness, integrity, or public reputation of the proceedings.

The defense theory was that Mr. Keys did not cause the alleged victims to engage in prostitution as they already had a plan to do so, and that Mr. Keys did not know the ages of the victims at first, and once he did, he parted ways with them. Jane Doe 1 testified much to that effect: before she even met the defendant, she and Jane Doe 2 planned to support themselves by engaging in prostitution, they had sex with men for drugs before they met the defendant. She further testified, that before they met the defendant, she, Jane Doe 1, forced Jane Doe 2 to have sex with men.

Jane Doe 2 testified the two girls had sex for drugs before meeting the defend-ant and they held themselves out to be 18 years old, which seemed to be believed. Jane Doe 2 further testified that it was Jane Doe 1 who taught Jane Doe 2 how to be a prostitute, told Jane Doe 2 to answer the door naked, and advised Jane Doe 2 on how to perform, and forced, pushed or told Jane Doe 1 to have sex with men. Jane Doe 2 never saw the defendant place an ad on Backpage. She further testified that Mr. Keys was gone for a couple of days during the short time she stayed at his house. Jane Doe 2 admitted she was suffering from hallucinations at the time, and consuming vast quantities of drugs. Detective Halbert testified that Mr. Keys told him that girls they did not look their age, they looked like adults, once he found out their age he had the girls leave, and never admitted using force or coercion.

Thus, a jury had to assess the credibility of the alleged victims against the assertions of the accused. The jury's task was distorted when two officers testified in sum that the defendant's statements were lies, the alleged victims told the truth, and the defendant is guilty. This affected the fairness of the trial, breached the integrity of the process, and tarnished the pubic reputation of the procedure. This is plain error requiring a new trial.

This is a direct affront to the right to have a jury determine the guilt or innocence of the defendant, and the right to have that guilt proved to a jury beyond a reasonable doubt by evidence. Mr. Keys asks this Court to grant certiorari to correct this gross error.

**Conclusion**

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the judgment below, and/or vacate the judgment and remand for reconsideration in light of any relevant forthcoming.

Respectfully submitted this 19th day of November, 2018.

*/s/ PETER FLEURY*
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