

No. _____

IN THE
Supreme Court of the United States

SALIH UCES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, the Eleventh Circuit violated Mr. Uces's rights under the Fifth Amendment, where it upheld the district court decision to constructively amend Mr. Uces's indictment for international parental kidnapping by instructing the jury that it could convict Mr. Uces based solely on his knowingly removing or retaining his child, even though the statute only prohibits removing or retaining a child with the intent to obstruct another's parental rights.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings.

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FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Salih Uces respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 17-12894 and 17-13893 on August 10, 2018, timely petition for rehearing denied on September 20, 2018, which affirmed the judgment and commitment of the United States District Court for the Middle District of Florida.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Uces*, 2018 WL 3814568 (11th Cir. 2017) (unpublished), which affirmed the judgment and sentence of the United States District Court for the Middle District of Florida, is contained in Appendix A-1.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on August 10, 2018, and a timely filed petition for rehearing was denied on September 20, 2018. Accordingly, this petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

LEGAL PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional provision:

U.S. Const., Amendment V

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.

18 U.S.C. § 1204

(a) Whoever removes a child from the United States, or attempts to do so, or retains a child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both.

(b) As used in this section--

(1) the term “child” means a person who has not attained the age of 16 years; and

(2) the term “parental rights”, with respect to a child, means the right to physical custody of the child--

(A) whether joint or sole (and includes visiting rights);
and

(B) whether arising by operation of law, court order, or legally binding agreement of the parties.

(c) It shall be an affirmative defense under this section that--

(1) the defendant acted within the provisions of a valid court order granting the defendant legal custody or visitation rights and that order was obtained pursuant to the Uniform Child Custody Jurisdiction Act or the Uniform Child Custody Jurisdiction and Enforcement Act and was in effect at the time of the offense;

(2) the defendant was fleeing an incidence or pattern of domestic violence; or

(3) the defendant had physical custody of the child pursuant to a court order granting legal custody or visitation rights and failed to return the child as a result of circumstances beyond the defendant's control, and the defendant notified or made reasonable attempts to notify the other parent or lawful custodian of the child of such circumstances within 24 hours after the visitation period had expired and returned the child as soon as possible.

(d) This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction, done at The Hague on October 25, 1980.

STATEMENT OF THE CASE

Mr. Uces was charged with a single count of international kidnapping, in violation of 18 U.S.C. § 1204. Doc. 12. In order to prove a violation of this statute, the government must prove that a defendant acted with the specific intent to obstruct the parental rights of another. 18 U.S.C. § 1204. At trial, Mr. Uces freely admitted that he had taken his daughter to Turkey and had not returned for several weeks. Doc. 100 at 67-68, 71. Thus the only issue for his jury to decide was whether or not he had acted with the specific intent to obstruct the lawful exercise of his wife's parental rights. However, Mr. Uces argued in the Eleventh Circuit, the jury instructions in the instant case also included the term "knowingly" and the instructions allowed the jury to find Mr. Uces guilty if he acted knowingly rather than with the specific statutorily required intent. The instruction thus impermissibly allowed the jury to convict Mr. Uces based on a ground not alleged in the indictment.

Mr. Uces argued on appeal to the Eleventh Circuit Court of Appeals that the district court had constructively amended the indictment by including "knowingly" in the jury instructions as an element of § 1204, in violation of his Fifth Amendment right to Due Process. *United States v. Uces*, 2018 WL 3814568, at *1 (11th Cir. August 10, 2018). The erroneous instruction thereby allowed the jury to convict Mr. Uces based solely on his knowingly removing or retaining his child.

Uces, at *1. The Eleventh Circuit disagreed and held that the inclusion of the word knowingly did not “broaden the bases for conviction because the jury was consistently reminded that it could only convict Mr. Uces if it found that he ‘acted with the intent to obstruct the lawful exercise of another person’s parental rights.’” *Id.* at *2. Mr. Uces now seeks a writ of certiorari to correct the Eleventh Circuit’s holding.

The Proceedings Before the District Court

Mr. Uces and his now former wife were born in Adana, Turkey. Doc. 98 at 74, 87-885. They both immigrated to the United States; got married and, in 2014, became the parents of a little girl. Doc. 67 at ¶ 5. In 2016, they separated, and Mr. Uces continued to be part of his daughter’s life. *Id.* On September 16, 2016, Mr. Uces took his daughter to Turkey without first informing his wife. *Id.* at ¶ 8. When they arrived in Turkey, Mr. Uces let his wife know where they were and that they would return in a few weeks with Mr. Uces. Doc. 67 at ¶ 9. His wife reported Mr. Uces to law enforcement and, on October 13, 2016, obtained a state court order requiring Mr. Uces to return her daughter to her custody. *Id.* Prior to this date, there were no court orders or legally binding agreements in effect regarding the custody. After making arrangements with authorities, Mr. Uces voluntarily returned to the United States with his daughter on November 9, 2016. Doc. 67 at ¶ 10.

The government charged Mr. Uces with one count of international parental kidnapping in violation of 18 U.S.C. § 1204. Doc. 12. Prior to trial, both parties and the district court agreed that in the State of Florida, by operation of law, both parents, Mr. Uces and his wife, had equal parental rights to the child. *Id.* at 8-17.

At trial, defense counsel argued that Mr. Uces did not intend to obstruct his wife's right to their child. Doc. 100 at 145-171. Rather, that it was Mr. Uces's wife, who was trying to control how much access he had to his daughter. Doc. 100 at 145-146. Defense counsel argued that Mr. Uces and his wife had planned to fly to Turkey in the fall of October of 2016, but his wife was unable to leave due to her job. *Id.* at 150-152. Mr. Uces then decided to take his daughter to his family home in Adana, Turkey to visit with relatives. *Id.* 152, 156-159. Defense counsel argued that the trip was similar to any family vacation, such as a trip to Georgia or Disneyland. *Id.* at 157. Defense counsel argued that Mr. Uces's wife knew where he was in Turkey the entire time and that she could have come to Turkey and to get her daughter had she wanted to do so. *Id.* 152-158. Defense counsel pointed out that, in 2016, Turkey was not agreeing to extradite people to the United States. *Id.* at 153-154. So, defense counsel argued, if Mr. Uces truly intended to keep his daughter from her mother, then all he needed to do was stay in Turkey. *Id.* Instead, Mr. Uces had returned with his daughter to the United States with full knowledge that he may face legal consequences. *Id.* at 159.

The government argued that Mr. Uces intended to obstruct his wife's parental rights based on his lying to her about taking his daughter to a hotel for the weekend and instead flying to Turkey. Doc. 100 at 121-141. According to the government, Mr. Uces had secretly planned to take his daughter to Turkey and keep her there. *Id.* at 125, 137. It pointed to the evidence that, before leaving the country, Mr. Uces gave his brother power of attorney to sell his car. *Id.* at 170. It also argued that the wife's passport was missing, so she was unable to go to Turkey and retrieve her daughter. *Id.* at 162. The government also argued that Mr. Uces had threatened his wife's uncle with violence and that he only returned to the United States because he thought he would not be arrested. *Id.* at 163-164, 167.

The jury was given five separate instructions regarding the elements of the offense of international parental kidnapping, two of which are set forth here. Doc. 61 at 7-12. Jury Instruction No. 7, defined the basic elements of the offense for both removing and retaining a child, however it also included the word "knowingly," which is not an element of the offense as defined in 18 U.S.C. § 1204. *Id.* at 7-8. The relevant portion of the instruction provided:

Mr. Uces can be found guilty of this offense only if the government proves, beyond a reasonable doubt, the following:

First, that the child was previously in the United States;

Second, that Salih Zeki Uces, either:

a) **knowingly** took the child from the United States to another country; or

b) beginning on or about September 16, 2016, until on or about November 10, 2016, **knowingly** retained the child outside the United States; and

Third, that Salih Zeki Uces, **acted with the intent to obstruct the lawful exercise of another person's parental rights.**

Doc. 61 at 7-88 (emphasis added).

Next, Jury Instruction No. 11 defined the word “knowingly” and provided:

The word “**knowingly**,” as used in these instructions, means that **an act was done voluntarily and intentionally and not because of a mistake or by accident.** In this case, that would mean that the Defendant voluntarily and intentionally removed a child from the United States or retained the child, who had been in the United States, outside of the United States. The government need not prove that the Defendant knew he was violating a criminal law or that he intended to violate a criminal law by removing the child from, or retaining the child outside of, the United States.

Doc. 61 at 12 (emphasis added).

During deliberations, the jurors had two questions. Doc. 58. The first question was, “As a parent, if I take my child out of the country, deceit intended or not, am I breaking the law?” Docs. 100 at 174, 58-1 at 2. The district court responded:

I cannot advise any of you whether any action you might take with respect to your child would be lawful or unlawful, and you should not concern yourself with that question at this time. Instead, you must follow the law set forth in my instructions and apply it to the evidence presented here in this courtroom to reach your verdict as to the charge brought against Mr. Uces.

Docs. 100 at 178, 58-1 at 3.

Approximately two hours later, the jurors submitted a second question, “Referencing Instruction #7: Does the act of intent to obstruct the lawful exercise of a persons parental rights have to occur AFTER the child was taken from the U.S.” Doc. 58-1 at 5. The district court responded by restating Jury Instruction #7 so that the jury was separately instructed on removing and retaining the child, but once again the district court included the word “knowingly.”

While I am not entirely sure what you are referring to as “the act of intent,” I will give you the following additional instruction:

Consistent with Instruction No. 7, Mr. Uces can be found guilty of this offense only if:

- A. the Government proves beyond a reasonable doubt
 1. that the child was previously in the United States;
 2. that Mr. Uces knowingly took the child from the United States to another country and,
 3. that in doing so, he acted with the intent to obstruct the lawful exercise of another person’s parental rights;

Or

- B. the Government proves beyond a reasonable doubt
 1. that the child was previously in the United States,
 2. that beginning on or about September 16, 2016, until on or about November 10, 2016, Mr. Uces knowingly retained the child outside the United States, and
 3. that in doing so, Mr. Uces acted with the intent to obstruct the lawful exercise of another person’s parental rights.

Doc. 58-1 at 6.

After further deliberations, the jury returned a general verdict of guilty as charged. Doc. 101 at 4. The district court sentenced Mr. Uces to 21 months' imprisonment followed by a one-year term of supervised release. Doc. 70.

The Appeal to the Eleventh Circuit

On appeal, Mr. Uces argued, *inter alia*, that the district court had constructively amended the indictment by including "knowingly" in the jury instructions as an element of 18 U.S.C. § 1204, thereby allowing the jury to convict Mr. Uces based solely on his *knowingly* removing or retaining his child. *United States v. Uces*, 2018 WL 3814568, at *1 (11th Cir. 2018 August 10, 2018). In support of his argument, Mr. Uces pointed to the jury's first question during the deliberations as proof that the jurors believed that a conviction could be based on a state of mind that was merely "knowingly."

The Eleventh Circuit Court affirmed the district court. *Uces*, 2018 WL 3814568, at *1. Citing the second jury question, but not the first, the Court opined that "[t]he term 'knowingly' may have indeed been unnecessary," but ultimately found that it was not error. *Id* at *2. Specifically, the Court held that the inclusion of the word knowingly did not "broaden the bases for conviction because the jury was consistently reminded that it could only convict Mr. Uces if it found that he 'acted with the intent to obstruct the lawful exercise of another person's parental rights.'" *Id*.

Accepting [Mr. Uces's] argument would require us to violate two cardinal rules. First, it asks us to assume that the jury completely ignored the instruction on the intent to obstruct the parental rights element, when “we must presume that juries follow their instructions.” *United States v. Roy*, 855 F.3d 1133, 1186 (11th Cir. 2017) (en banc). *See also Olano*, 507 U.S. at 740, 113 S.Ct. 1770 (“We presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.”) (alterations adopted). Second, it asks us to look at the jury instructions in isolation. To the contrary, “instructions must be evaluated not in isolation but in the context of the entire charge” and “there is no reason for reversal even though isolated clauses may, in fact, be confusing, technically imperfect, or otherwise subject to criticism.” *United States v. Gonzalez*, 834 F.3d 1206, 1222 (11th Cir. 2016). *See also United States v. Park*, 421 U.S. 658, 674–75, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975) (“[I]n reviewing jury instructions, our task is to view the charge itself as part of the whole trial. Often statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial.”) (quotation marks omitted).

The term “knowingly” may have indeed been unnecessary. As Mr. Uces notes, it is unlikely that a parent could act with the requisite intent to obstruct parental rights without knowingly removing or retaining his or her child outside the United States. Such removals are unlikely to happen by mistake or accident. Its inclusion did not, however, broaden the bases for conviction because the jury was consistently reminded that it could only convict Mr. Uces if it found that he “acted with the intent to obstruct the lawful exercise of another person’s parental rights.” *See* D.E. 61 at 7–8 (original jury instruction); D.E. 58-1 at 6 (response to jury question). Beyond this, Mr. Uces has not pointed to

any precedent that would establish that the inclusion of “knowingly” was error, so he has not met his burden to show plain error. *See Sammour*, 816 F.3d at 1337.

Uces, 2018 WL at *2.

A timely petition for panel rehearing was denied on September 20, 2018.

REASONS FOR GRANTING THE PETITION

Under U.S. Supreme Court Rule 10(a), this petition for a writ of certiorari should be granted. The Eleventh Circuit Court of Appeals has sanctioned the district court’s departure from the accepted and usual course of judicial proceedings by allowing the district court to deny Mr. Uces his right to Due Process under the Fifth Amendment. The district court violated Mr. Uces’s right by permitting the constructive amendment of his indictment to include the lesser *mens rea* of “knowingly,” where he was indicted on the statutorily correct *mens rea* of “with intent to obstruct the parental rights of another.” Therefore Mr. Uces respectfully requests that this Court exercise its supervisory power and grant this petition.

This Court has long held that the Fifth Amendment right to Due Process guarantees that a defendant has the right to be tried on felony charges returned by a grand jury indictment and that only the grand jury may broaden the charges in the indictment once it has been returned. *Stirone v. United States*, 361 U.S. 212, 215-16 (1960). “Ever since *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849, was

decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.” *Id.* at 215–16. Here, the district court allowed, and the Eleventh Circuit sanctioned, the broadening of the indictment by constructively amending it to include the term knowingly.

The indictment charged Mr. Uces with removing his child from the United States or retaining her outside the United States with the “intent to obstruct the lawful exercise of another person’s parental rights.” Doc. 12. The language of the indictment tracked the language of 18 U.S.C. § 1204, which prohibits international parental kidnapping. Thus, the grand jury’s charge required that the government prove Mr. Uces acted, not just intentionally, but with the specific intent to obstruct the parental rights of another. “Intent to obstruct” was the only state of mind mentioned in indictment and it is the only state of mind listed in 18 U.S.C. § 1204. However, the jury instructions in instant case added another state of mind – knowingly – and the instructions set forth the elements of the offense in so confusing a manner that the jury was allowed to convict Mr. Uces based solely on a finding that he “knowingly” removed or retained his child -- a finding that is much broader than the grand jury’s charge of “intent to obstruct.”

The jury instructions on the charged offense were set forth in five separate instructions. Doc. 61 at 7-12. The language used to define terms overlapped to

such an extent that it was not clear to the jury exactly which state of mind was to be applied.

The basic elements of international parental kidnapping, including the element of intent to obstruct parental rights, were set forth in Jury Instruction No. 7. Doc. 61 at 7. The instruction directs the jury that it “may find the Defendant guilty of this offense if you find that, *with the requisite intent*, he either removed a child from the United States or retained a child outside the United States or both.” *Id.* (emphasis added). Had the instruction stopped there and not included the term “knowingly,” then it would have been clear to the jury that it must find that Mr. Uces had acted with the intent to obstruct the parental rights of another. However, that instruction went on to use the term “knowingly” to modify the words “took” and “retained.” *Id.* at 8. And it did not explain what the phrase “requisite intent” meant for the purposes of the jury instructions. The relevant portion of the instruction stated:

Mr. Uces can be found guilty of this offense only if the government proves, beyond a reasonable doubt, the following:

First, that the child was previously in the United States;

Second, that Salih Zeki Uces, either:

- a) **knowingly** took the child from the United States to another country; or
- b) beginning on or about September 16, 2016, until on or about November 10, 2016, **knowingly** retained the child outside the United States; and

Third, that Salih Zeki Uces, acted with the intent to

obstruct the lawful exercise of another person's parental rights.

Doc. 61 at 7-8. (emphasis added).

The term “knowingly” was defined several instructions later, in Jury Instruction No. 11, as an act that, “was done voluntarily and *intentionally* and not because of a mistake or by accident.” *Id.* at 12. (emphasis added). The instruction then specifically applied the definition of term “knowingly” to the elements of removed or retained, stating:

The word “knowingly,” as used in these instructions, means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

In this case, that would mean that the Defendant voluntarily and intentionally removed a child from the United States or retained the child, who had been in the United States, outside of the United States. The government need not prove that the Defendant knew he was violating a criminal law or that he intended to violate a criminal law by removing the child from, or retaining the child outside of, the United States.

Id. (emphasis added). By using the word “intentionally” as part of the definition of “knowingly,” the jury instructions made the term “knowingly” the equivalent of intentionally. In other words, the instructions allowed the jurors to find that Mr. Uces acted with intent, specifically the intent to obstruct, based on a finding of only acting knowingly. As such, a constructive amendment occurred because Mr. Uces may have been convicted on a ground not charged in the indictment. Such plain error merited a reversal by the Eleventh Circuit.

Instead, the Eleventh Circuit affirmed citing to two presumptions, “two cardinal rules” that must be applied reviewing jury instructions. *Uces* at *2. The first is the presumption that jurors follow the instructions given to them, and the second is that jury instructions cannot be considered in isolation. *Id.* The Eleventh Circuit stated that in order for Mr. Uces’s argument to succeed, both of these rules would have to be ignored. *Id.*

However, the Eleventh Circuit’s position is incorrect as Mr. Uces did not and does not ask that this Court assume that the jury completely ignored the instruction on the intent to obstruct element. Rather, Mr. Uces maintained that the inclusion of the term “knowingly” broadened the bases for conviction from solely requiring a finding that he acted with the “intent to obstruct” to also permitting conviction based on a finding that he acted “knowingly.” The inclusion of the term “knowingly” did not cancel out the rest of the jury instruction, but it did mislead the jurors into believing that a lesser state of mind was sufficient as evidenced by the first jury question.

In their first question, the jury asked, “As a parent, if I take my child out of the country, *deceit intended or not*, am I breaking the law?” Docs. 100 at 174, 58-1 at 2 (emphasis added). In other words, the jury was asking whether knowingly taking a child out of the country, without any additional intent was sufficient to

violate the law. Had the jury been clear as to the elements of the offense, this question would never have been asked.

Additionally, Mr. Uces did not and does not ask that the one erroneous jury instruction be considered in isolation. Since it is presumed that the jury read all the instructions, the jury's first question regarding the correct state of mind demonstrated that the inclusion of the term "knowingly" caused them to believe that Mr. Uces need not have acted intentionally.

Mr. Uces argued these points on appeal to the Eleventh Circuit, however, the court chose to sanction the violation of Mr. Uces's right to Due Process. Mr. Uces disagrees with the Eleventh Circuit and respectfully asks this Court to grant this petition and exercise its supervisory power over the Eleventh Circuit.

CONCLUSION

For the above reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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