No. ____

October Term, 2019

IN THE
Supreme Court of the United States

JERMAYNE WHYTE,
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

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER
BERNARDO LOPEZ
Assistant Federal Public Defender
Attorney for Petitioner
1 E. Broward Blvd, Ste. 1100
Ft. Lauderdale, FL 33301
(954) 356-7436
Bernardo_Lopez@fd.org

QUESTION PRESENTED FOR REVIEW

Federal sex trafficking statute, 18 U.S.C. § 1591(a), makes it illegal for anyone to sex traffic a minor knowing or with reckless disregard for the fact "that the person had not attained the age of 18 years and will be caused to engage in a commercial sex act." Under that provision, the government must prove that the defendant either knew or had reckless disregard for the fact that the victim was a minor. Another provision in the same statute provides as follows:

> In the prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

18 U.S.C. § 1591(c). This petition presents the following questions:

> **Whether 18 U.S.C. § 1591(c) creates a self-standing strict liability offense with regard to the age of the victim that removes the mens rea element in § 1591(a) so that the government does not have to charge or prove that the defendant either knew or had a reckless disregard for the fact that the victim was a minor and which precludes a defendant from introducing any evidence that the defendant had no knowledge that the victim was minor, that the defendant did not recklessly disregard the fact that the victim was a minor and that it was reasonable for the defendant to think that the victim was not a minor?**

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED CASES

There are no related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutory And Other Authority:

IN THE
SUPREME COURT OF THE UNITED STATES

No:

JERMAYNE WHYTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Mr. Jermayne Whyte 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 number 17-15223 in that court on July 10, 2019, *United States v. Whyte,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

IN THE
SUPREME COURT OF THE UNITED STATES

No:

JERMAYNE WHYTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

---

PETITION FOR WRIT OF CERTIORARI

Mr. Jermayne Whyte 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 number 17-15223 in that court on July 10, 2019, *United States v. Whyte,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF 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 July 10, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The Court of Appeals issued its decision on July 10, 2019. Mr. Whyte filed a timely petition for rehearing and rehearing en banc. The Court of Appeals denied the petitions on August 28, 2019. 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. V:

No person 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.

18 U.S.C. § 1591(a), (c):

(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 participating in a venture which has engaged in an act described in violation of paragraph (1).

Knowing, or, except where the act constituting the violation of paragraph (1) is advertising, 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 engage in a commercial sex act, or that the person had 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).

(c) In the prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

In a superseding indictment, a federal grand jury in the Southern District of Florida charged Mr. Jermayne Whyte and his co-defendant with one count of conspiracy to commit sex trafficking of a minor in violation of 18 U.S.C. §§ 1591(a)(1), (b)(2), (c), 1594(c) (Count One); one count of sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1), (b)(2), (c) (Count Two); and one count of transporting an individual across state lines for purposes of prostitution in violation of 18 U.S.C. § 2421(a) (Count Three). (DE 36). Following a jury trial, Mr. Whyte was convicted on all three counts. (DE 118). The district court sentenced Mr. Whyte to a 300-month term of imprisonment as to both counts one and two and a 120-month term of imprisonment as to count three. (DE 155). All sentences were ordered to run concurrently. *Id.*

STATEMENT OF FACTS

Mr. Jermayne Whyte is a thirty-one year-old native of Queens, New York. Presentence Report (PSR) at ¶ 66. Jermayne's mother was just sixteen years old when she gave birth to him. PSR ¶ 67.

Jermayne was raised in a high-crime, gang-infested neighborhood in Jamaica, Queens, New York until he was thirteen years old. PSR ¶ 67. At twelve or thirteen, he and his mother moved to South Florida. PSR ¶ 68. Things did not go much better in South Florida.

Jermayne was abusing illegal drugs by age sixteen, and he was a chronic runaway. PSR ¶¶ 68, 80. Not surprisingly, Jermayne had his first interaction with law enforcement at the tender age of twelve when he was caught as a truant with a stolen bicycle. PSR ¶ 57. That escalated to stealing more bicycles and breaking into vehicles at fourteen. PSR ¶¶ 58, 59, 60.

Jermayne dropped out of high school in the eleventh grade in large part because he had spent a year and a half in a juvenile residential program instead of attending school. PSR ¶ 82. Jermayne never got his high school diploma or an equivalency diploma. PSR ¶83. It was not until after he left school that Jermayne was diagnosed with attention deficit hyperactivity disorder. PSR ¶ 76.

In 2013, Jermayne began a serious relationship with Jennifer Castro, his co-defendant. PSR ¶ 71. They have a two year-old son together. In addition, Jermayne was helping raise Ms. Castro's seven year-old from a prior relationship. *Id.* Despite anything else they may have been accused of doing, Ms. Castro noted that Jermayne was a very good caregiver. *Id.*

In the present case, Jermayne and Ms. Castro befriended another female, A.E., whom Ms. Castro met while working as an exotic dancer at a club in South Florida. Like Ms. Castro, the female worked as a stripper and as a prostitute from ads placed in the Backpage website. The female did not have a permanent place to live, so Jermayne and Ms. Castro invited her to live with them and their two young children. During the weeks that the female lived with Jermayne and Ms. Castro, the female, and Ms. Castro, continued to work as strippers and prostitutes. The female told

Jermayne and Ms. Castro that she was an adult, and, based on her appearance and maturity, they accepted that as fact.

Unbeknownst to Jermayne and Ms. Castro, A.E. was in fact a sixteen year-old runaway from California who was in violation of her criminal probation. Information gathered based on her runaway status, and unrelated to Jermayne and Ms. Castro, revealed that A.E. was working at a strip club in South Florida under an assumed name. Federal agents went to the strip club and arrested A.E.. Questioning from the federal agents and a search of her telephone revealed her connection with Jermayne and Ms. Castro. The agents learned that A.E. received help from Jermayne and Ms. Castro in getting bookings at strip clubs and advertising on Backpage website used in the soliciting for prostitution.

Because A.E. was a minor, Jermayne Whyte was charged in federal court with sex traffic offenses. Initially, the government charged that he either knew or had a reckless disregard for the fact that A.E. was a minor. However, in a superseding indictment, he was charged only with having a reasonable opportunity to view A.E.. Specifically, a federal grand jury in the Southern District of Florida charged Jermayne Whyte and Ms. Castro with one count of conspiracy to commit sex trafficking of a minor in violation of 18 U.S.C. §§ 1591(a)(1), (b)(2), (c), 1594(c) "having had a reasonable opportunity to observe A.E., and knowing and in reckless disregard of the fact that A.E. would be caused to engage in a commercial sex act" (Count One); one count of sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1), (b)(2), (c) "having had a reasonable opportunity to observe A.E., and knowing and in reckless

disregard of the fact that A.E. would be caused to engage in a commercial sex act" (Count Two); and one count of transporting an individual across state lines for purposes of prostitution in violation of 18 U.S.C. § 2421(a) (Count Three). (DE 36). Neither Count One nor Count Two charged that Jermayne or Ms. Castro knew that A.E. was a minor or that they each had a reckless disregard for the fact that A.E. was a minor.

Jermayne and Ms. Castro proceeded to trial. Following a jury trial, Mr. Whyte was convicted on all three counts. (DE 118).

Prior to sentencing, Mr. Whyte filed objections to the sentencing calculations. At sentencing, the district court overruled those objections. The district court sentenced Mr. Whyte to a 300-month term of imprisonment as to both counts one and two and a 120-month term of imprisonment as to count three. (DE 155). All sentenced were ordered to run concurrently. *Id.* Mr. Whyte timely appealed.

On appeal, the Eleventh Circuit held that Congress' amendment of 18 U.S.C. § 1591 created a stand-alone strict liability offense in § 1591(c) as to the victim's age that prevented the defendant from presenting any evidence tending to prove, or arguing, that it was reasonable for him to believe that the victim was not a minor. *United States v. Whyte*, 928 F.3d 1317 (11th Cir. 2019). Mr. Whyte field a petition for rehearing en banc which was denied.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's holding that 18 U.S.C. § 1591(c) creates a strict liability offense is contrary to the established precedent of this Court where a conviction under § 1591 carries a substantial penalty of up to life imprisonment and it is not sufficiently clear from the language of § 1591 that Congress intended for § 1591(c) to remove the mens rea elements of § 1591(a) and create a stand-alone strict liability offense which prevents a defendant from presenting a mistake-of-age defense.

The Eleventh Circuit Court of Appeals issued a published opinion affirming Mr. Whyte's convictions for conspiracy to sex traffic a minor (count one) and sex trafficking a minor (count two), in violation of 18 U.S.C. 1591. *United States v. Whyte*, 928 F.3d 1317 (11th Cir. July 10, 2019). The Eleventh Circuit held that in order to prove a violation of § 1591, the government need only charge and prove that the defendant had a reasonable opportunity to observe the minor victim, under § 1591(c), and not that the defendant actually knew or recklessly disregarded the fact that the victim was a minor as required by § 1591(a). As such, the Eleventh Circuit held that Mr. Whyte "was not entitled to a mistake-of-age defense or an instruction about it because, when the government proceeds on the theory that a defendant had a reasonable opportunity to observe the victim, his mistake about the victim's age is no defense." *Id.* at 1330.

"'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (quoting *EEOC*

v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)). One of these presumptions is "that a criminal statute derived from the common law carries with it the requirement of a culpable mental state – even if no such limitation appears in the text – unless it is clear that the Legislature intended to impose strict liability." *Id.*

Here, Mr. Whyte was charged with one count of conspiracy to sex trafficking A.E. (Count One), and sex trafficking A.E. (Count Two). Those offenses are derived from common law offenses. *See Anderson v. Commonwealth*, 5 Rand. 627, 630-31 (Gen. Ct. of Va. Nov. 1, 1826) (citing *The King v. Lord Grey and others*, 9 State Trials, (Cobbet's edition) pa 127 ("an information, alleging a conspiracy to take away, and debauch a maiden over the age of sixteen, and under twenty-one, and an accomplishment of the act by those means"); The case of *Sir Francis Blake Delaval and others*, 3 Burr. 1432 ("a motion for an information against the defendants for a conspiracy to put a young girl into the hands of a gentleman of rank and fortune, for the purpose of prostitution.")). Accordingly, the offenses charged against Mr. Whyte are presumed to require a "culpable mental state . . . unless it is **clear** that the Legislature intended to impose strict liability." *See Bond*, 134 S. Ct. at 2088.

In addition, "offenses that require no *mens rea* generally are disfavored." *Staples v. United States*, 511 U.S. 600, 606 (1994), "Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*." *Id.* at 616. Where an offense has a substantial penalty as a consequence, the courts require that Congress'

intent to remove any *mens rea* be abundantly clear. *Id.* at 620. No such clear intent to remove the *mens rea* required in § 1591(a) exists here.

Mr. Whyte was charged and convicted of sex trafficking a minor in violation of 18 U.S.C. § 1591. Section 1591 was amended in 2015. The pertinent part of the current statute provides as follows with the added 2015 language in bold and bracketed:

> (b) Whoever knowingly –
>
> (d) 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
>
> (e) benefits financially or by receiving anything of value, from participating in a venture which has engaged in an act described in violation of paragraph (1).
>
> Knowing, or, **[except where the act constituting the violation of paragraph (1) is advertising]**, 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 engage in a commercial sex act, or that the person had 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).

18 U.S.C. § 1591(a). Subsection (c) of that statute, not part of the provision of the statute that sets out the basic *mens rea* of the offense, was also amended in 2015. The prior version of § 1591(c) and the current version differ only as follows with the added 2015 language in bold and bracketed:

> In the prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, **[patronized, or solicited]**, the Government need not prove that the defendant knew,

> **[or recklessly disregarded the fact]**, that the person had not attained the age of 18 years.

18 U.S.C. § 1591(c).

Prior to trial, the government filed a motion in limine to prohibit Mr. Whyte from presenting any evidence or making any argument that Mr. Whyte reasonably believed A.E. to be an adult including statements by A.E. to Mr. Whyte that she was an adult. (DE 83). Specifically, the government argued that "[p]ursuant to Title 18 U.S.C. § 1591(c), once the government has established that the defendant had reasonable opportunity to observe the minor victim, the element of knowledge or reckless disregard, or the *mens rea*, is satisfied through **strict liability**." *Id.* at 1 (emphasis added). The district court denied the government's motion without prejudice. (DE 191:72). In response to defense counsel's concerns that the ruling may still effect defense opening statements, the district court informed defense counsel that they were free to make references to the evidence. *Id.* at 72, 73.

Prior to trial, defense counsel filed proposed jury instructions including a theory of defense instruction based on a mistake of age defense. (DE 101). During opening statements, counsel for Mr. Whyte in fact spoke about the lack of any evidence to prove that Mr. Whyte "believed or should have believed that A.E. was under the age of 18." (DE 192:224). However, on the start of the second day of trial, the district court sua sponte raised the issue that the offense as charged was a strict liability offense and that the defense of mistake of age would not be allowed. (DE 193:326-332). In fact, the district court held that, with respect to the *mens rea* regarding the victim's age, the offense was a strict liability offense and the defense of

mistake of age would not be allowed, and thus removed the only defense Mr. Whyte had with regard to counts one and two. Having been deprived of his only defense in the middle of trial, Mr. Whyte was convicted by the jury.

The 2015 Amendment to § 1591 Did Not Remove the Mens Rea Requirement from § 1591(a) and Did Not Create A Stand-alone Strict Liability Offense in § 1591(c).

Congress provided a clear explanation that § 1591 was amended "to add the words '**solicits and patronizes**' to the sex trafficking statute making absolutely clear for judges, juries, prosecutors and law enforcement officials that criminals who purchase sexual acts from human trafficking victims may be arrested, prosecuted, and convicted as sex trafficking offenders when this is merited by the facts of the particular case." Justice for Victims of Trafficking Act of 2015, Pub. L. 114-22, Title I, § 109, 129 Stat. 239 (May 29, 2015) (emphasis added). Congress noted that it was prompted to add that clarifying language by an Eighth Circuit case, *United States v. Jungers*, 702 F.3d 1066 (8th Cir. 2013), which reversed the acquittal of two such buyers. *See id.* *Jungers* only dealt with the issue of whether § 1591 criminalized conduct for both suppliers and purchasers of commercial sex acts with children. *See Jungers*, 702 F.3d at 1069. The case did not deal with subsection (c) or the requisite *mens rea*. The 2015 amendment likewise only dealt with the clarification that § 1591 applied to both suppliers and purchasers of commercial sex acts with children. That was the focus of Congress when it amended § 1591, to ensure that the johns who sought to perform the sexual abuse on children would also be punished. Nothing in

the act or its legislative history suggests that Congress intended to create a strict liability offense as to the age of the victim by means of that amended language.

No Clear Intent that Congress Wanted to Remove Scienter

The Eleventh Circuit's holding that the 2015 amendment created a strict liability offense in § 1591(c) that removed the mens rea otherwise required by § 1591(a) is wrong because the amendment fails to demonstrate the requisite desire from Congress to remove the scienter elements of knowing or reckless disregard for the victim's status as a minor from § 1591. This Court recently reiterated that in evaluating the *mens rea* of a criminal statute, it will presume that Congress intended that defendants have a culpable mental state as to each essential element. *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (June 21, 2019). And, as noted above, the harsher the potential penalty, the stronger the presumption in favor of scienter. *See Staples*, 511 U.S. at 615-617.

Here, Mr. Whyte was convicted of an offense that carries a potential life sentence. Even taking into account that § 1591 deals with the potential sexual abuse of a minor, similar statutes where Congress has removed the scienter requirement with regard to the victim demonstrate a much clearer decision by Congress to that effect. For example compare § 1591 with 18 U.S.C. § 2241(c), aggravated sexual abuse of children, which carries a maximum sentence of life imprisonment. That offense carries no other *mens rea* with regard to the age of the victim and it expressly has a subsection entitled "state of mind proof requirement" in which it spells out that the government does not have to prove the age of the victim without requiring the

government to prove anything else first such as a reasonable opportunity to observe. 18 U.S.C. § 2241(d). The words added to § 1591(c) fail to demonstrate that same level of desire on the part of Congress to eliminate the *mens rea* included in § 1591(a). The Eleventh Circuit's holding that the amendment abrogated this Court's prior precedent is thus incorrect.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: _____

Bernardo Lopez
Assistant Federal Public Defender
Counsel For Petitioner Hernandez

Fort Lauderdale, Florida
November 25, 2019