Number ___

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

LUIDJI BENJAMIN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should certiorari be granted where venue was laid in the Southern District of New York, even though no elements of the crime occurred there, including enticement?

2. Should certiorari be granted because a jury cannot be deemed to have disregarded a court's admonition not to consider what even the District Court conceded was a mistakenly admitted admission of guilt?

3. Should certiorari be granted because the government placed Petitioner's character in issue, in its case-in-chief, by eliciting from Darryn Denver that he had a reputation as a "swindler,' to prove he acted in conformity with that trait?

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OPINIONS BELOW

There was one opinion below, which is attached to this petition. *United States v. Walsh*, No. 19-3130, 2020 U.S. App. LEXIS 28947 (2d Cir. Sep. 11, 2020).

JURISDICTION

The order of the Court of Appeals was decided on September 11, 2020, and this petition for a writ of certiorari is being filed within 90 days thereof, making it timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Venue under the United States constitution, art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed .... ") and character evidence under Fed. R. Evid. 404(b).

STATEMENT OF THE CASE

Petitioner and Lawrence Walsh were charged, on December 11, 2018, by a grand jury in the Southern District of New York, in a two count indictment. Count One charged they participated in a sex trafficking conspiracy involving at least one minor victim, in violation of Title 18, United States Code ("U.S.C."), Section 1594, while Count Two charged them with sex trafficking of a minor, in violation of Title 18, U.S.C., Sections 1591(a), (b)(2), and 2.

Petitioner was convicted of both counts and sentenced to 204 months' imprisonment. In a summary order on September 11, 2020, the Second Circuit Court of Appeals affirmed his conviction. *United States v. Walsh*, No. 19-3130, 2020 U.S. App. LEXIS 28947 (2d Cir. Sep. 11, 2020).

STATEMENT OF FACTS

Taionna Thompson, a madam, who was also trafficked other women in the past, had a sexual relationship with Petitioner for two to three months. She told him she was 16-years-old. She also told Petitioner she "like[d]" writing the advertisements soliciting sex work on Backpage.com while he took the pictures and he posted them on his account. In 2015, she worked for Petitioner selling sex for cash and gave all the cash she earned to him.

The co-defendant, Lawrence Walsh, a pimp, and former prostitute who pleaded guilty to conspiracy to commit sex trafficking and the substantive offense of sex trafficking, alleged he engaged in the charged conduct in 2015 with Petitioner. He heard Petitioner ask two women, Khalia and Monique, if they wanted to engage in prostitution. After Khalia agreed, Petitioner began posting advertisements for commercial sex services on Craigslist.com. Walsh was next to Petitioner when he posted the advertisements. Petitioner also prostituted Khalia through non-advertisements. Petitioner's relationship with Khalia ended when they had a fight and she attacked him.

Darryn Denver became a prostitute at 15-years-old for Lawrence Walsh. At the same time, Petitioner attempted to recruit her as a prostitute. She was introduced to Petitioner by a school friend, Zae Peterson, and later stayed for a week at Walsh's house, where she had sex with Walsh and once with Petitioner.

When Denver said she wanted to make money, Walsh and Petitioner said she could trade sex for money. Petitioner helped Walsh post advertisements for prostitution. She would then speak with customers when they called. Petitioner twice asked her to work for him, but she said no.

SUMMARY OF ARGUMENT

Certiorari should be granted for three reasons.

First, venue was laid in the Southern District of New York, even though no elements of the crime occurred there, including enticement.

Second, a jury cannot be deemed to have disregarded a court's admonition not to consider a mistakenly admitted admission of guilt. While juries are presumed follow a court's limiting instructions, that does not apply to admissions.

Third, the government cannot place a Petitioner's character in issue, in its case-in-chief, by eliciting he had a reputation as a "swindler,' to prove he acted in conformity with that trait, even before he placed his character in issue.

ARGUMENT

POINT I

CERTIORARI SHOULD BE GRANTED WHERE VENUE WAS LAID IN THE SOUTHERN DISTRICT OF NEW YORK, EVEN THOUGH NO ELEMENTS OF THE CRIME OCCURRED THERE, INCLUDING ENTICEMENT.

Venue was improperly laid in the Southern District of New York because no aspect of the crime, including enticement, occurred in that district. The Second Circuit Court of Appeals disagreed. It ruled:

> We conclude that the government introduced sufficient evidence to establish venue for both counts of conviction in the Southern District of New York. A minor testified that Benjamin first contacted her using Facebook Messenger in the fall of 2015, when she was living in a residential treatment center located in the Southern District of New York [in Westchester County]. The minor thought of Benjamin as her boyfriend, and they discussed meeting in person over Facebook Messenger. The minor then travelled [sic] from her residence to Queens, where she met Walsh and then Benjamin. Once in Queens, she began a sexual relationship with Benjamin and lived with Benjamin for the next two to three months. During that time, Benjamin suggested that the minor engage in prostitution. The minor agreed and was later featured in commercial sex advertisements listing Benjamin's contact information. We conclude that this evidence was sufficient for a reasonable jury to find[,] by a preponderance of the evidence[,] that Benjamin recruited or enticed the minor, while she resided in the Southern District of New York, to engage in prostitution and that venue was therefore proper for both

> counts of conviction. *See* 18 U.S.C. § 1591(a); *United States v. Kim*, 246 F.3d 186, 192 (2d Cir. 2001)(noting that "communications to and from New York were sufficient to support venue for . . . prosecution in the Southern District").

The Court is incorrect. None of these facts establish that any element of the offense occurred in the Southern District. The communications themselves were innocent, and had nothing do with prostitution. The issue of prostitution never broached in the Southern District, and was only raised some three months into the intimate relationship, in the Eastern District of New York.

A criminal defendant, however, has a right to be tried in an appropriate venue, here, in the Eastern District and not the Southern District of New York. *See* U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed .... "); *id*. amend. VI (requiring trial of a criminal case "by an impartial jury of the State and district wherein the crime shall have been committed"). "[E]cho[ing] the[se] constitutional commands," *United States v. Cabrales*, 524 U.S. 1, 6, 141 L. Ed. 2d 1, 118 S. Ct. 1772 (1998), Congress also limited criminal prosecutions to "a district in which the offense was committed." Fed. R. Crim. P. 18. These rules

ensure that a criminal defendant cannot be tried in a distant forum solely based on a prosecutor's whim.

The Government did not prove venue here, by a preponderance of the evidence, because the jury could not reasonably determine what Petitioner had "in mind" when he never once discussed prostitution with Tiaonna in either New York or Westchester Counties, hence rendering venue in the Southern District of New York improper.

There was no criminal conduct, such as persuasion, inducement, enticement, or coercion of the minor victim in the Southern District of New York, leading her to engage in sex acts in the Eastern District of New York.

The Second Circuit's holding--that a " ... reasonable jury [could] find[,] by a preponderance of the evidence[,] that Benjamin recruited or enticed the minor"--is incorrect, because it is not based on any evidence in the record. It is, rather, illogical: the parties had a relationship for about three months in the Eastern District before the issue of prostitution even arose.

The Second Circuit simply ruled that, because the Petitioner spoke with a woman about non-criminal matters in the Southern District, that was enough to confer venue. In fact, it is not.

The Second Circuit's ruling echoed the District Court's finding, to wit, that venue can rest on what a defendant may have "had in [his] mind" at the inception of the relationship. Were that a legal standard for venue, Article III, section 2, clause three of the United States constitution would lose its force, because prosecutors could argue that, so long as a defendant "had in mind" the criminal intent to commit a crime in the charging district, that was sufficient to confer venue, even if no criminal acts and no persuasion, inducement, enticement, or coercion occurred there. *Compare United States v. Engle*, 676 F.3d 405, 415-16 (4th Cir. 2012)(venue found where defendant "knowingly enticed A.M. to engage in sexually explicit conduct with him for the purpose of producing a visual depiction of that conduct"); *United States v. Sullivan*, 753 F.3d 845, 854 (9th Cir. 2014)(" ... the evidence adduced at trial supports the district court's findings that the persuasion, inducement, enticement and coercion that led to the video's filming in Vacaville had their genesis in the Northern District")(*citing Engle*).

The Second Circuit's reliance on *United States v. Kim*, 246 F.3d 186, 192 (2d Cir. 2001), is misplaced. There, the Court ruled that

> Kim does not aggressively argue against venue with respect to the conspiracy charge, but does claim that venue was improper for those counts as well * * * Because the wire communications in this case were part of a continuing violation by Kim and clearly furthered the conspiracy, we find that venue was proper for the conspiracy counts. *Id*. at 193 n.5 (citations, grammatical marks and internal quotation marks omitted).

In *Kim*, the illegal wire communications, a criminal act, conferred venue; here, nothing conferred venue, because there were no criminal acts, including enticement, in the Southern District.

Regardless, the Government predicated venue in the Southern District on an inference about Petitioner's state of mind when he first spoke with the Complainant. The two met on Facebook and later became lovers. Some two to three months *after* forming an intimate relationship, the Government alleged the complainant asked her, in the Eastern, but not the Southern District, to engage in acts of prostitution. Yet the only way the Government could prove venue in the Southern District was by establishing that which cannot, in fact, be proven in a court of law,

namely, Petitioner's state of mind, and intent, when the two first met and became lovers months earlier. That is speculation.

The Government's theory of venue left no room for a scenario where the defendant had no criminal intent *ab initio*, entered into a consensual relationship with the complainant, and then, once that union was formed, first proposed the idea of prostitution two to three months later.

Rather, it insisted on a theory that, if the defendant spoke to a woman, for any reason, in any capacity, on any social media platform, it *ipso facto* was for the purposes of prostitution. In other words, the subsequent conduct, to the Government, automatically proved the prior conduct for venue purposes. Yet without proof of why, what or how Petitioner spoke to the woman, his subsequent decision for her to enter into prostitution did not prove, in any way, that that was his initial motivation. Rather, it is simply a *post-hoc* rationalization to justify non-existent venue.

Neither this nor any other federal court has ever approved of this type of thought-based venue. Nor has any court found that venue can be inferred based on after-the-fact conduct. Certiorari should thus be

granted to find that venue must be based on where a crime, or any element thereof, was committed, rather than where the Government believed a defendant may have thought about committing a crime.

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE A JURY CANNOT BE DEEMED TO HAVE DISREGARDED A COURT'S ADMONITION NOT TO CONSIDER WHAT EVEN THE DISTRICT COURT CONCEDED WAS A MISTAKENLY ADMITTED ADMISSION OF GUILT.

At trial, the Government sought to admit Petitioner's alleged joking admission of guilt to his co-defendant at the Metropolitan Correctional Center. Under questioning by the District Court, the co-defendant testified Petitioner showed him a discovery motion and said, "in a joking, like joking gesture, that humorous gesture that mean [sic] they got us now." When the District Court asked him "[w]hat did you understand him to mean by that?" he testified that "[t]hey were caught." Over objection that a joke is not an admission, the Court then ruled "I will let the testimony stand, and counsel can make of it what they each wish to make on the basis of what has been said to the jury." But after the jury heard and considered the admission for a period of time, the District Court realized its error, and reversed itself, instructing the jury:

> ... after further thought, I'm going to ask you to disregard the testimony regarding the last conversation in the MCC, where Mr. Benjamin allegedly said something that was in a joking way or something like that. I think it's really too

> ambiguous for you to draw conclusions about that particular conversation. So, that will be stricken from the record.

Preliminarily, the District Court's subsequent ruling was correct. An ambiguous joke should not be introduced as an admission of guilt because of the risk the jury will improperly accept it as evidence of guilt.

Of course, juries are presumed to follow a court's limiting instructions. *See Zafiro v. United States*, 506 U.S. 534, 540-41, 122 L. Ed. 2d 317, 113 S. Ct. 933 (1993)(emphasizing that prejudice "can be cured with proper instructions, and juries are presumed to follow their instructions")(internal quotation marks omitted). But that presumption is overcome "where there is an overwhelming probability that the jury will be unable to follow the court's instructions and the evidence is devastating to the defense." *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994)(*citing Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987)). Stated alternatively, Courts have found a jury cannot follow a district court's limiting instructions when the instructions requires jurors to perform "mental acrobatics." *Id*. *Cf. United States v. McDermott*, 245 F.3d 133, 140 (2d Cir. 2001)("Although the district court here provided the jury with standard

limiting instructions, we find that under the circumstances of the case, where the prejudicial spillover was so overwhelming, they cannot be presumed to be effective"); *United States v. Colombo*, 909 F.2d 711, 715 (2d Cir. 1990)(finding an overwhelming probability that, despite limiting instructions, the jury was unable to dispassionately consider evidence of rape and sodomy admitted as "background" in a trial for RICO conspiracy and narcotics violations).

Here, it is beyond peradventure that telling a jury to consider a defendant's admission that the government "got" him because had been "caught" and then asking it to not consider this evidence, is simply impossible.

It is a legal fiction to think otherwise. There is an overwhelming probability that the jury would be unable to follow the court's instructions. This is particularly true because Petitioner's alleged admission to Walsh was devastating to the defense. An admission, similar to a confession, "is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296, 113 L. Ed. 2d 302, 111 S. Ct. 1246, 1257 (1991), and a jury cannot disregard it--even if told to do so. *Cf. Bruton v. United States*, 391 U.S. 123, 139-140 88 S. Ct. 1620, 20 L. Ed.

2d 476 (1968)(White, J., dissenting)(" .... we may justifiably doubt [a jury's] ability to put [a confession] out of mind even if told to do so."

This Court has never addressed when, and under what circumstances, a jury can follow a court's instruction when an admission has been incorrectly introduced into evidence--according to the *nisi prius* court itself. This, therefore, is a case of first impression.

Review is warranted given the enormous number of cases in which Circuit Court's rule that an error is harmless because a jury is presumed to follow a court's instructions to disregard improper evidence. While that may be true in the overwhelming majority of cases, it is not true regarding an admission of guilt. Certiorari should thus be granted.

POINT III

CERTIORARI SHOULD BE GRANTED BECAUSE THE GOVERNMENT PLACED PETITIONER'S CHARACTER IN ISSUE, IN ITS CASE-IN-CHIEF, BY ELICITING FROM DARRYN DENVER THAT HE HAD A REPUTATION AS A "SWINDLER," TO PROVE HE ACTED IN CONFORMITY WITH THAT TRAIT.

In its direct case, the Government questioned its chief witness, Darryn Denver, about Petitioner's reputation in the community, before he had the opportunity to introduce character evidence. Over objection, it asked her if Petitioner had ever asked her to work for him, and she said no, because " ... word around the street around that time was that he was a swindler." The District Court overruled defense counsel's objection to the witness's characterization of Petitioner as a "swindler," and permitted the jury to consider it in its deliberations.

The Second Circuit Court of Appeals affirmed, and reasoned " ... we need not resolve whether this evidence was properly admitted because its inclusion was harmless in light of the district court's prompt decisions to sustain defense counsel's objection to the witness's description of what she meant by a "swindler" and instruct the jury to disregard that description." The Court misread the record and is wrong.

In fact, the Assistant United States Attorney asked the witness:

> Q. Did [Benjamin] ever ask you to work for him?
>
> A. Yes.
>
> Q. Do you recall approximately how many times?
>
> A. Twice, maybe three times.
>
> Q. And what did he say to you?
>
> A. That I should make money then.
>
> Q. What did you understand make money to mean?
>
> A. To do what I was doing with Life with him.
>
> Q. By that, do you mean prostitution?
>
> A. Yeah.
>
> Q. What was your response to Zoe?
>
> A. No.
>
> Q. *Why did you say that?*
>
> MS. APPS: *Objection.*
>
> THE COURT: ***Overruled***.
>
> THE WITNESS: *Because word around the street around that time was that he was a swindler.*
>
> BY [AUSA] GUTWILLIG:

> Q. Can you explain to me what you mean by swindler?
>
> A. *Once he got a female, he was able to do whatever he want with them*.
>
> MS. APPS: Your Honor, I move to strike *the last answer; 40*3.
>
> THE COURT: *Sustained*. The jury will disregard the *last question and answer* (emphasis added).

Clearly, then, the Second Circuit is wrong, because the District Court specifically overruled defense counsel's objection to the witness's characterization of the Petitioner as a "swindler," and *only* sustained the objection to her testimony that, once he " ... got a female, he was able to do whatever he want [sic] with them."

In any event, the error was improper for six reasons. First, whether Petitioner was a swindler, or used deception to deprive someone of money, was irrelevant to whether he sexually trafficked a minor.

Second, it was hearsay. Denver testified she believed Benjamin was a swindler not because of what she experienced or sensorially perceived but, rather, based on what she heard "around the street." As a result, Petitioner had no opportunity to cross-examine what people

"around the street" actually said, hence depriving him of his Sixth Amendment right to cross-examination.

Third, it was an attack on Petitioner's character to prove the acted in conformity with that trait, in violation of Fed. R. Evid. 404(b).

Fourth, even if the Government sought to establish Petitioner had engaged in other swindles, it failed to provide him with reasonable notice that it intended to elicit this at trial.

Fifth, by eliciting testimony that Petitioner had a reputation of being a swindler, the Government improperly introduced evidence of his character in its case-in-chief, even though he had not yet interposed his good character at trial. Where, however, the character or reputation of the accused is not an element of the crime charged, as here, the government may not offer evidence of bad character, unless the defendant first offers evidence of good character. Here, the Petitioner could not offer character evidence because the error occurred in the Government's case, before he had the opportunity to put on a case.

Sixth, instead of striking the witness's character assassination from the record or issuing curative instructions, the District Court did neither, thereby inviting the jury to consider this in reaching its

determination. Taken together, certiorari should be granted to address the admissibility of this improper evidence.

CONCLUSION

THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: September 16, 2020
Manhasset, New York

Respectfully Submitted,

Arza Feldman
Arza Feldman

UNITED STATES
SUPREME COURT

LUIDJI BENJAMIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I affirm, under penalties of perjury, that on September 16, 2020, we served a copy of this petition for writ of certiorari, by first class United States mail, on the United States Attorney, Southern District of New York, 1 St. Andrews Plaza, New York, NY 10007, on the Solicitor General, 950 Pennsylvania Avenue, NW Washington, DC 20530-0001, and on Luidji Benjamin, Clinton Correctional Facility, 1156 Route 374, P.O. Box 2000, Dannemora, NY 12929-2000. Contemporaneous with this filing, we have also transmitted a digital copy to the United States Supreme Court and are filing one copy of the petition, instead of 10, with this Court, pursuant to its April 15, 2020 order regarding the Covid-19 pandemic.

Arza Feldman
Arza Feldman