No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL JOHNSON,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

On Petition For A Writ Of Certiorari To the United States Court Of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. The Ninth Circuit held that for a conviction under 18 U.S.C. § 2241(c) (aggravated sexual abuse), the government must prove, and the jury must be instructed, that there was a sex act with a specific victim under the age of 12. In the District Court, the petitioner had requested an instruction for the § 2241(c) count (count 8), identifying a specific victim under twelve. His request was denied. The Ninth Circuit found that to be error, but harmless.

The Ninth Circuit held the error harmless because the jury found, in a different count (count 3), that the petitioner was guilty of illicit sexual conduct with a specific victim (LS). In that count, the government proved LS was "under eighteen." The Ninth Circuit observed that testimony and photographs in evidence established that LS was also under twelve. Thus, it concluded, the jury's finding in count 3, and other evidence about LS, were sufficient to sustain the conviction in count 8, even though the District Court left out an element of the crime in the instruction for count 8. Because of the ruling on the jury instruction, the defendant could not contest the age of the alleged victims, which removed an available defense.

Was the error -- permitting a jury instruction that was missing an element, and thus determined what evidence was admissible -- harmless?

2. Did the petitioner's removal from Cambodia, via South Korea, violate the "Rule of Specialty"? Was the petitioner unfairly deprived of his ability to examine

key government witnesses, and to obtain key documents, to be able to answer this question?

3. Was the prosecution under the then-current version of 18 U.S.C. § 2423 (traveling in foreign commerce and engaging in illicit sexual conduct with minors) impermissible, because the petitioner was a resident of Cambodia, that is, he was not "traveling"?

4. During voir dire, a prospective juror, who worked professionally with sex abusers, blurted out that the petitioner smiled like a sex abuser. That juror was excused for cause, but five prospective jurors who heard the remark ultimately sat on the jury. Was the jury impermissibly tainted by that?

Parties To The Proceedings

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were the following:

1. Daniel Johnson, the petitioner, was the defendant-appellant below.
2. The United States of America, the respondent, was plaintiff-appellee below.

All Proceedings In State And Federal Trial And Appellate Courts, That Are Directly Related To The Case In This Court.

The petitioner had a trial in the District of Oregon, 6:14-cr-00482-MC.

He appealed to the Ninth Circuit, 19-30028.

Counsel is aware of no other case that directly relates to the case before this Court.

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the United States Court Of Appeals
For the Ninth Circuit

Petitioner Daniel Johnson respectfully petitions for a writ of *certiorari* to review the memorandum decision and order of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's memorandum decision is attached here as Appendix A. The district court decisions are attached as Appendix B. The district court's judgment is attached as Appendix D.

Basis for Jurisdiction

The District Court had original subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit issued its memorandum decision and judgment August 12, 2020.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is being filed within 90 days of the judgment in the Ninth Circuit, issued August 12, 2020.

Statutory Provisions

Former 18 U.S.C. § 2423(c) Transportation of minors (sexual conduct in a foreign place) (effective July 2006 to March 6, 2013), provides:

> **(c) Engaging in illicit sexual conduct in foreign places.**--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.
>
> (The current version provides:
>
> **(c) Engaging in illicit sexual conduct in foreign places.**--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.)

18 U.S.C. § 2241(c) Aggravated sexual abuse (crossing state lines with the intent to engage in a sexual act with a person under 12) provides:

> **(c) With children.**--Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, shall be fined under this title and imprisoned for not less than 30 years or for life. If the defendant has previously been convicted of another Federal offense under this subsection, or of a State offense that would have been an offense under either such provision had the

offense occurred in a Federal prison, unless the death penalty is imposed, the defendant shall be sentenced to life in prison.

The full text of the statutes is in Appendix E.

Statement Of The Case

1. The petitioner was charged with aggravated sexual abuse by crossing state lines with the intent to engage in a sexual act with a person under 12 (count 8). The District Court declined to instruct the jury that it must identify a particular victim under 12, and that the government must prove that the petitioner committed a sexual act with that victim. (App-12, App-13.) The Ninth Circuit ruled that failing to give the instruction was error, but it was harmless because the government proved (in count 3) that the petitioner had abused LS, and it incidentally proved that LS was under 12, and that was sufficient to establish a crime in count 8. The District Court ruling shaped the presentation of evidence, and the government cannot show, beyond a reasonable doubt, that it was harmless.

2. The petitioner was arrested in Cambodia, and was returned to the United States, in custody, through South Korea. For his defense, he was not able to subpoena three government witnesses who were the key to show whether or not the removal process was legally authorized. Also, two key documents were missing. Without these witnesses and documents, it is impossible to determine whether or not the Rule of Specialty was violated. (App-24.) The case must be remanded for a

complete hearing with those witnesses and documents; if the Rule of Specialty was violated, the petitioner cannot be prosecuted for counts 2-8.

3. 18 U.S.C. § 2423(c) (the version at issue) provided that a citizen who traveled in foreign commerce, and engaged in any sexual conduct with a person under 18, meant that during the applicable time period, a citizen-defendant could be prosecuted only if the illicit sex was while he was "traveling," not if he were a resident of the country where the illicit sex allegedly occurred. The "traveling" vs. "resident" issue was not a part of the instructions, because the District Court had followed a case from a sister District Court. However, the Ninth Circuit reversed that case after the trial, but before sentencing. The District Court should have granted the petitioner 's motion for a new trial on these grounds on counts 1-6 (charging that offense), and also for counts 7-8 because all the counts were closely related. (App-24.)

4. During voir dire, a prospective juror spontaneously said that the petitioner smiled like a sex offender. She was excused for cause, but the remark was heard by five jurors who sat on the case. The remark directly contaminated those five, and indirectly contaminated the entire jury. This was plain error.

The petitioner is serving a life sentence, concurrently with a 180-year sentence, at the federal prison in Tucson, Arizona.

This case should be reversed and remanded. The petitioner is entitled to

(1) a new trial on count 8, where the jury is properly instructed;

(2) a hearing with the needed witnesses and documents to determine if the Rule of Specialty was followed; if it was not, counts 2-8 must be dismissed;

(3) a new trial on counts 1-6, and 7-8, with a correct jury instruction on whether or not the petitioner was "traveling";

(4) a new trial with a jury untainted by an inflammatory remark by a prospective juror/"expert."

Factual background

1. The testimony of the HTC residents.

The petitioner is a United States citizen. The indictment alleged that the petitioner had improper sexual contact with six minor males after traveling, or he traveled with the intent to have the contact. The alleged contact was at the petitioner's non-profit group home, Hope Transitions Center (HTC), in Phnom Penh, Cambodia. The petitioner provided housing, food, and education to the residents, who all came from desperately poor families, who could not support them.

A number of young Cambodian men testified at trial that the petitioner had sexual contact with them, during time periods that started as early as 2006, and ended with the petitioner's arrest in December 2013. They were residents of HTC at the time of the contact. The young men testified that they were minors at the time, and established their ages with their Cambodian passports. However, there was also

evidence that they were all from very impoverished families, and their birth dates may not be accurate.

Most significantly, LS testified that he was born in 2002, and moved to HTC in 2009, along with his older brother ES. He testified that the abuse stopped when LS told the petitioner's Cambodian assistant, a pastor, in 2013. A photograph of LS is in the record.

2. The petitioner's movements before his arrest.

The petitioner was a missionary in Cambodia; he listed "missionary" on his U.S. passport applications. Part of his job as a missionary was to raise funds for the mission. He made frequent trips to the United States, and traveled in Oregon, California, and Texas to raise funds.

There was a good deal of evidence, presented by both parties, that Cambodia is rife with corruption. The petitioner kept a bank account in the United States, and had U.S. credit cards. He had a U.S. driver's license (as well as a Cambodian one), to use during his fund-raising trips in the United States. His U.S. documents used one address, his brother's, in Coos Bay, Oregon.

The jury was instructed, as part of a stipulation:

> Mr. Johnson traveled in interstate and foreign commerce between the United States and Cambodia, between, on, or about the following dates:
>
> November 28, 2005, departing the US, to December 6, 2005, arriving in Cambodia;

January 11, 2007, departing the US, January 12th, 2007 arriving in Cambodia;

October 10, 2008, departing the US, October 11, 2008, arriving in Cambodia;

October 22nd, 2009, departing the US, October 23rd, 2009, arriving in Cambodia;

June 8, 2010, departing US, June 10, 2010, arriving in Cambodia;

January 18, 2011, departing the US, January 19, 2011, arriving in Cambodia.

Mr. Johnson was present within the District of Oregon and then traveled in interstate and foreign commerce between the United States and Cambodia on or about the following dates:

June 21st, 2011, in Oregon, July 5, 2011, departed the US, July 7, 2011, arrived in Cambodia;

December 1st, 2011, in Oregon, December 20th, 2011 departed the US, December 22nd, 2011, arrived in Cambodia;

July 24, 2012, in Oregon, August 24, 2012, departed the US, August 27, 2012, arrived in Cambodia;

November 19, 2012, in Oregon, December 5, 2012, departed the US, December 7, 2012, arrived in Cambodia;

May 28, 2013, in Oregon, May 29, 2013, departed the US, May 30, 2013, arrived in Cambodia. RT 1196.

The petitioner left Cambodia frequently, but stayed in Southeast Asia, to purchase supplies more cheaply in neighboring countries, or, occasionally, to

vacation. In total, he left and arrived in Cambodia 95 times between March 3, 2005, and September 26, 2013. Exhibit 176.

There was a favorable change in Ninth Circuit law after the verdict but before sentencing. *United States v. Pepe*, 895 F.3d 679 (July 11, 2018). It clarified that the statute requires that a petitioner be "traveling" to commit the offence under the then-applicable 18 U.S.C. § 2423 (c).

The petitioner filed a motion for a new trial, on the grounds that the jury had not been instructed accurately on the law, and on the grounds that the statute was now unconstitutional as applied. CR 297. The court denied it in a written ruling, in Appendix B.

3. How the petitioner was moved from Cambodia to the United States after his 2013 arrest.

i) United States and Cambodia.

There is no extradition treaty between the United States and the Kingdom of Cambodia.

The petitioner was indicted in Oregon, in August 2013, for a state felony sex offense, alleged to have occurred many years before. An arrest warrant was issued. The FBI, working with local authorities, then asked the United States State Department to revoke the petitioner's passport. That was done October 17, 2013.

Based on the arrest warrant, local law enforcement, working with the FBI,

eventually located the petitioner at HTC, on December 9, 2013. The FBI and the Cambodian police were working with APLE (*Action Pour Les Enfants)*, a non-government organization dedicated to investigating child abuse in Cambodia.

The petitioner was arrested, and the minor residents of HTC were interviewed. Ultimately, the petitioner was arrested that day for child abuse in Cambodia, not for an immigration violation. He was charged and convicted in Cambodia, of two counts of sex abuse, and was sentenced to one year in Cambodian custody. CR 77 exhibit 22. His term was complete on December 12, 2014.

Meanwhile, on December 10, 2013, a federal grand jury indicted the petitioner in one count, for illicit sexual conduct with the one minor, in violation of 18 U.S.C. § 2423(c). This allegation was the same as count 1 of the final eight-count indictment, which is in Appendix C.

At the petitioner's trial in Cambodia, on June 10, 2014, the Cambodian victims' attorney asked that the petitioner be permanently banned from Cambodia. The court did not grant that request. CR 77, exhibit 22.

On December 12, 2014, the Cambodian court upheld the one-year sentence, but as to the deportation request, it wrote:

> Regarding the additional penalty, the Criminal Chamber of the Appeal Court finds that it is not necessary to deport the accused out of the Kingdom of Cambodia -- because the accused was involved in many activities doing humanitarian works.

CR 108, Exhibit 8-1.

On December 13, 2014, the petitioner was released from Cambodian prison, and transferred to the custody of Cambodian General Department of Immigration (GDI). CR 114, exhibit 12. The record refers to a deportation letter, but this letter was never produced, as the government could not find it.

On December 18, 2014, the U.S. Legal Attaché, Jackson Purkey, received notice from APLE that "there is a court order not to deport Daniel Johnson back to the United States and that the same order states that he is to be released today by 5 pm." Exhibit 15, CR 114, ER-144. Purkey replied, "It is my view and understanding regardless of the court order, he is still in violation of Immigration law since his passport has been revoked. Therefore we just need to make sure they see it the same way." Exhibit 15, CR 114. That notice from APLE was never produced.

Cambodian immigration transferred custody of the petitioner to the FBI at the Phnom Penh airport on December 22, 2014. CR 114, Exhibit 12.

The U.S. Department of State "Activity Log" that was provided to the defense is heavily redacted, removing the names of the staff creating the document. CR 114, exhibit 13.

On December 22-23, 2014, the petitioner, escorted by an FBI agent, traveled from Cambodia to South Korea, then to Canada, and then returned to the United States in Portland, Oregon.

On February 12, 2018, a lawyer at U.S. State Department initially described the process as: "this looks like this fugitive return was an extradition, as opposed to a deportation or other non-extradition return." CR 114, exhibit 10.

ii) United States and South Korea.

There are no direct flights from Cambodia to Oregon, so the petitioner had to fly through another country. The country the government selected was the Republic of Korea ("South Korea.")

The United States Department of Justice communicated with its counterpart in South Korea, seeking permission to transport the petitioner from Cambodia to South Korea, and then from South Korea to the United States. There is an extradition treaty between these two countries; on December 15, 2014, the DOJ sought permission pursuant to Article 17 of that treaty. CR 66, exhibit 2. That Article provides:

> Either contracting State may authorize transportation through its territory of a person surrendered to the other State by a third State. A request for transit shall be transmitted through the diplomatic channel or directly between the department of Justice in the United States and the Ministry of Justice in the Republic of Korea. It shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit may be detained in custody during the period of transit.

The treaty (Article 2) also requires "dual criminality," meaning that, for an extradition, the crime a U.S. citizen is charged with must also be a crime (or its equivalent) in the extraditing country, in this case, South Korea. Treaty, Article 2, CR 66, exhibit 6.

The South Korean official who received the DOJ request responded with: "in regard to dual criminality, you need to clarify the fact of crime of Daniel Stephen Johnson. What does it mean specifically by illicit sexual conduct? Did he [buy] sex or did he rape?" The DOJ attorney (Michael Surgalla) replied, ". . . Johnson was operating an unlicensed orphanage in Cambodia where he molested children. The indictment alleges that Johnson traveled from the United States to Cambodia, where he engaged in illicit sexual conduct with a minor under the age of 18 years." CR 66, exhibit 3.

In response to that, the Korean official provided DOJ with a copy of the Korean criminal code, and Surgalla apparently read it and opined that, "it seems to me that the conduct described by the U.S. prosecutor [in the District of Oregon indictment] most closely resembles Article 302 or perhaps 303." The Korean official replied, "My doubt is solved and I think there is no problem in dual criminality. I will proceed with your transit request as soon as possible . . ." CR 66, exhibit 3. South Korea issued a "Permission to Transit Criminal for Extradition." CR 66, exhibit 4.

Counsel moved to dismiss all counts save count 1, based on the Rule of Specialty.

The court ruled:

> Mr. Johnson was transferred through South Korea pursuant to Article 17 of the extradition treaty between the United States and South Korea. * * * The treaty allows South Korea to authorize transportation through its territory a person surrendered to the United States by a third state. * * *

> Here, the Government did comply with Article 17, * * *
>
> [Y]es, I mean, would I like a more concrete document that puts forth the actual order of deportation or the letter of notice? That's not part of the exhibits, but I have numerous exhibits in which these documents are referenced, and they are in evidence.
>
> So I'm denying the motion to dismiss counts [2-8]. I'm finding this was not an extradition from South Korea, but a transit under Article 17.

2/15 RT 209-213, App-17.

The government supplemented the record with the declaration of Olson, opining this was not an extradition. CR 100. Defense counsel reiterated his need to examine Olson, and the other officials who participated in the process.

4. Prospective juror's statements during voir dire.

Jurors were summoned in groups of 16; three groups were interviewed. The voir dire was done by the lawyers. Five of the jurors in the second group ultimately sat on the jury. In this second group, a prospective juror named Megan N. told the lawyers, in front of the venire:

Defense counsel: Ms. N, you also had a personal experience. Is that something that you could talk about?

Prospective Juror Megan N: No.

Counsel: Would you be willing to talk about it privately?

Megan: No.

Counsel: Not at all? Well, if we talk to you privately later about why you can't

talk about it privately, would that be ok?

Megan: I believe that's the wrong answer to ask -- question to ask. I think there's two reasons why the defense and the prosecutor wouldn't necessarily want me on this jury, but it doesn't have anything to do with that.

Counsel: So you can understand why we want to ask the questions, but you don't think it would ---

Megan: I don't think that question is going to lead you to decide whether or not I am appropriate for the jury.

Counsel: What would be better questions?

Megan: I have an 11-year history of working with offenders of domestic violence, sex abuse and child abuse. That sways me a little.

Counsel: In what capacity?

Megan: Before I left, after 11 years of working with offenders, one on one and in groups, and in individual interviews, it was about 1,000 men I had contact with. About 999 of them smiled, and your client, when he was introduced on day one, also smiled. And it was a smile I had recognized in 999 men.

The court: Let me ask you, have you already made up your mind in this case without hearing the evidence?

Megan: I would be surprised to change my mind.

The prospective juror was excused for cause. RT 88-89. There were no follow-

up questions to the other prospective jurors.

5. The jury instruction for count 8 (aggravated sexual abuse).

Count 8 charges that the petitioner "did knowingly cross a state line with the intent to engage in a sexual act, as defined in Title 18, United States Code, Section 2246(2), with a person who had not attained the age of 12 years, and attempted to do so; In violation of Title 18 United States Code, Section 2241(c)."

The government moved for an instruction that count 8 did not require a sexual act, only crossing a state line with the intent to commit a sexual act with a person under 12. CR 56. The court agreed. CR 97.

The petitioner asked that the model Ninth Circuit instruction be given, which does require a sexual act as an element, and asked that the specific victim of the sexual act -- in this case LS -- be named in the instruction.

The court denied the defense request, concluding that the counts stated inchoate crimes, but ruled the government had to connect the traveling or crossing with a specific trip. The jury instruction is in at App-13.

As to count 8, the jury was instructed:

> Count 8 of the indictment. Mr. Johnson is charged in Count 8 of traveling across a state line with the intent to engage in a sexual act with a person who was less than 12 years old.
>
> In order for you to find him guilty of this charge the government must prove each of the following elements beyond a reasonable doubt: One, Mr. Johnson traveled across a state line between on or about June 23rd, 2011, and May 29,

2013; and two, Mr. Johnson traveled with the intent to engage in a sexual act with a person who is less than 12 years old.

Again, the government does not have to prove that Mr. Johnson actually engaged in a sexual act with a person under 12, but must prove that he traveled with the intent to engage in such conduct.

RT 2001-02 (App-13.)

Reasons For Granting The Petition

1. The government cannot be relieved of its obligation to prove every element; the defendant must be able to defend against every element.

The Ninth Circuit agreed with the petitioner that there needed to be an actual victim for a violation of 18 U.S. C. § 2241. "The essential conduct elements are (1) crossing a state line, (2) with intent to engage in a sexual act with a child, and (3) engaging in or attempting to engage in a sexual act with a child." *United States v. Lukashov*, 694 F.3d 1107, 1121 (9th Cir. 2012).

However, the trial court had ruled, before trial, that the government did not have to prove that an actual victim was involved. Thus, neither party identified a victim for count 8 during testimony. The government mentioned LS during it closing as an example, not as a victim in count 8. It was the Ninth Circuit who supplied LS as the victim.

As a consequence, LS was not a part of the evidence for count 8, and LS's age was not at issue in the trial, except that he was under 18.

For a conviction under § 2241, the jury must be instructed that LS was the victim, and the government must prove that LS was under 12. This element could have been challenged, as the government would have had to rely on the birth date of a young man who likely was not born in a hospital, indeed, whose birth was probably not recorded. He later got a passport so he could travel to the United States to testify. With the court's ruling on the jury instruction, the defense never got to challenge the process that was used to obtain his birth date.

The Ninth Circuit concluded that the verdict was "supported by uncontroverted evidence." Opinion, page 7. It was "uncontroverted" because after the District Court's ruling, the petitioner was not permitted to controvert it.

We acknowledge that omitting a jury instruction can be harmless error. *Neder v. United States*, 527 U.S. 1, 8 (1999). However, in that case, the trial court failed to instruct on an essential element, but that element had been conceded by the defense. In our case, the element was stricken from the entire case: the government was not required to prove it; any defense to LS's age (under 12) would have been irrelevant. That is a dispositive difference from *Neder.* Defendant Neder was deprived of a perfect instruction; the erroneous instruction was harmless error. But this petitioner was deprived of a defense. The Ninth Circuit approved the lack of instruction because it concluded that the jury would have convicted him anyway,

based on his recently-issued passport (and a passport issued to allow him to testify), and based on a photograph in the record.

Neder does not control. The petitioner is entitled to a trial where the government proves every element. A failure of proof of an element is not susceptible to a harmless error analysis.

For constitutional error, the court must reverse unless it can say, beyond a reasonable doubt, that the error did not affect the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). It cannot do so in this case. The error was not harmless.

2. The petitioner's removal from Cambodia, and then South Korea violated the Rule of Specialty.

The petitioner's removal from Cambodia to South Korea, and then from South Korea to the U.S., raises many questions. Key pieces of information were not available to the defense, and this information was essential to understand precisely what occurred during the removal process. Specifically, as to witnesses, the court declined the defense request to produce government witnesses:

-- Jeffrey M. Olson, Department of Justice, Office of International Affairs, who filed a declaration interpreting the Korea/United States Treaty that is a key to this issue.

-- Michael Surgalla is apparently an attorney at the U.S. Department of Justice, Criminal Division, Office of International Affairs. He corresponded with Korean authorities in December 2014.

-- Jackson Purkey is the U.S. Legal Attaché, he arranged for the petitioner's removal from Cambodia, through Korea.

These potential witnesses were not made available at trial, either.

By date of the hearing on this issue, February 14-15, 2018, the government had produced 57,000 pages of discovery, but not the two key documents needed for this argument:

(1) the report on December 18, 2014, from APLE stating that the petitioner was to be released from Cambodian prison "today by 5 pm," and,

(2) the letter from Cambodian authorities purportedly deporting the petitioner.

The government argued that the petitioner was lawfully removed from Cambodia, and was "transited" (not "extradited") from Korea. Without the key witnesses and documents, the petitioner could not meet these arguments. The court agreed with the government, and as a consequence of that ruling, the petitioner faced eight counts and a potential life sentence (which he received), rather than facing one count, with a maximum possible sentence of 30 years.

If the Rule of Specialty applies, the petitioner could only be tried for the one charge in the original indictment, involving Minor #1. Counts 2-8 would have to be

dismissed. Article 15 sets out the "Rule of Specialty: a person "cannot be detained, tried, or punished in the Requesting State except for the offenses for which extradition has been granted * * * ."

a. There are many unanswered questions about the petitioner's removal from Cambodia, which was the basis of his removal from Korea.

We know there is no extradition treaty between the United States and Cambodia, so the government had to use another method to get the petitioner back to the United States to prosecute him. The entire premise of the "cancel the passport" method, is that it assumes that cancelling the petitioner's passport means that he cannot be in Cambodia, and if he cannot be in Cambodia, that means that he can be kept in custody, and can be turned over to U.S. law enforcement on the tarmac at the Phnom Penh airport. The defense acknowledges that U.S. courts do not enforce Cambodian (or South Korean) law, but that is not the point now. The United States court needs to satisfy itself that when a treaty is involved, as it was with South Korea, that the treaty was not violated.

To determine whether a U.S. treaty was violated, the defense needed to question Attaché Purkey to ask him why he chose to ignore the information from the missing document, reporting the Cambodian court's refusal to order the petitioner be deported. Purkey's email simply says that he understood that the petitioner was "in violation of [Cambodian] Immigration law since his passport has been revoked.

Therefore we just need to make sure they see it the same way." What does that mean? What did he do to make sure that this infamously corrupt government saw things "the same way" as did the U.S. officials? Where is the order that the Khmer-speaking APLE agent described to Purkey, that the petitioner was to "be released today [December 18, 2014] by 5 pm"? 2/15 RT 201. Was this court order translated accurately?

b. There are too many unanswered questions; the case must be remanded to answer them.

The petitioner is serving a life sentence, concurrent to a (total) 180-year sentence, based on the conclusion that his removal to the United States did not violate a treaty. However, the petitioner was not allowed to have the information to refute the government's arguments. This case must be remanded for a hearing with the needed government witnesses and documents.

3. The petitioner was a "resident," he was not "traveling," so his conduct is outside the reach of the statute.

The law in the Ninth Circuit at the time of trial interpreted the then-current controlling statute (18 U.S.C. § 2423) as making no distinction between a U.S. citizen who resided in a foreign country, and a so-called "sex tourist," that is, one who traveled to a foreign country, engaged in illicit sex, and then returned home.

The only act that mattered was that the person traveled and had illicit sex. The statute in effect at the time of the offense provided:

> Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(c) (effective July 27, 2006 to March 6, 2013) (Appendix E).

Correspondingly, the jury was instructed that:

> First, Counts 1 through 6. Mr. Johnson is charged in Counts 1 through 6 of the indictment with traveling in foreign commerce and engaging in illicit sexual conduct in a foreign place in violation of Section 2423(c) of Title 18 of the United States Code. In order for him to be found guilty of these charges the government must prove each of the following elements beyond a reasonable doubt.
>
> One, that Mr. Johnson is a United States citizen; two, that Mr. Johnson traveled in foreign commerce from the United States to Cambodia; and three, Mr. Johnson engaged in illicit sexual conduct with the victims referenced [and specifically named] in that count of the indictment, * * * six different minor alleged victims. * * *.

RT 1198- 99.

On July 11, 2018, in *United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018), the Ninth Circuit clarified that the statute required that the defendant be "traveling," not a resident (either temporary or permanent). *Pepe* changed the previous understanding of how to read the statute.

The Ninth Circuit in *Pepe* held that "a conviction under [the applicable version of] § 2423(c), when based on a defendant's travel in foreign commerce, requires proof that the illicit sexual conduct occurred while the defendant was traveling." 895 F.3d 691. While the illicit conduct did not have to occur while traveling, *e.g.,* in the airplane, the statute does not apply to those who "reside, either temporarily or permanently, in a foreign country." That was so because in 2013 Congress changed the statute to add liability to those who "reside, either temporarily or permanently, in a foreign country."[1] If Congress added those words, that means the previous statute did not include defendants who "reside, either temporarily or permanently, in a foreign country."

Pepe did not announce a new rule of law but, rather, it merely interpreted the then-current statute, so the rule it announced applies to the petitioner. The erroneous instruction the jury was given permitted the jury to rely on a legally invalid theory to find the travel element.

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[1] The revised version, effective March 7, 2013, to May 28, 2015 (and the same as the current section):

c) Engaging in illicit sexual conduct in foreign places.--Any United States citizen or alien admitted for permanent residence who travels in foreign commerce or resides, either temporarily or permanently, in a foreign country, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both. 18 U.S.C.A. §2423(c) (Appendix E.)

In our case, the government presented evidence that the defendant had an Oregon driver's license, issued on April 14, 2010, a passport stating an Oregon address, credit card statements listing an Oregon address, and, of course, the defendant used a U.S. passport in his travels overseas.

Unfortunately for the petitioner, *Pepe*'s elucidation of the applicable statute was after the verdict, although before sentencing. The petitioner moved for a new trial, and the court was required to have granted it for two reasons: the jury instruction misstated the law, and the petitioner's evidentiary presentation was incorrectly limited.

The petitioner was a missionary in Cambodia, and part of being a missionary was to raise money for the mission. Cambodia is exceedingly poor; the petitioner had to go to a place where he had contact with people with generous hearts and deep pockets. He went to the United States as part of his mission. He was not in the United States to visit; he was not moving around the world looking for a place to land. He had found his place, in Phnom Penh, Cambodia. The petitioner spent years in Cambodia, was deeply involved with missionary work, and showed every indication that he had no plans to reside elsewhere.

The petitioner was behaving as any rational expatriate would. He had to have a U.S. driver's license to drive around in the U.S. on his fund-raising trips, using borrowed cars. He had to have a stable mailing address so he could continue to be

financially responsible for HTC's expenses. Given the undisputedly chaotic nature of the Cambodian government, he needed an address to be in a stable country. Further, the physical location of HTC moved three times, all within Phnom Penh, during the time he ran it; this too shows a need for a stable mailing address.

The petitioner was a U.S. citizen residing abroad, and he was outside the reach of the then-current 18 U.S.C. § 2423(c). To repeat: the clause adding ". . . who travels in foreign commerce or *resides, either temporarily or permanently, in a foreign country*. . ." was added later. The petitioner resided in Cambodia, at least "temporarily," if not "permanently." It is a defense that he resided in Cambodia, and trips were for work-related fund-raising. He was not permitted to present this defense, because it did not appear to be an issue.

However, he did, in passing, present solid evidence that he was a resident of Cambodia. His connections to the United States were to raise funds, or to manage funds in a stable country rather than in a chaotic country riddled with corruption. The government's closing argument stated, "He always intended to go back, and he always did factually go back to Cambodia." That was because Cambodia was his home, his "residence."

The petitioner was entitled to an opportunity to present evidence about the now-relevant fact that he was a resident of Cambodia, and he was entitled to a jury

instruction that an element of the charged crime was that he was "traveling," not a resident.

4. The faux "expert" in the jury pool.

During voir dire, prospective juror Megan N. told the court, and the other 15 prospective jurors in the second group of venire members, that she had "an 11-year history of working with offenders of domestic violence, sex abuse and child abuse." She then stated:

> [A]fter 11 years of working with offenders, one on one and in groups, and in individual interviews, it was about 1,000 men I had contact with. About 999 of them smiled, and your client, when he was introduced on day one, also smiled. And it was a smile I had recognized in 999 men.

It is impossible to know what, if any effect this had on the verdict, but at the very least, the jurors should have been instructed to disregard her comments. It is particularly significant that she qualified herself as an expert in child abusers and sex offenders, and then opined that she recognized him as a sex offender. At that point, even absent a specific request, the District Court was required to admonish the venire that if any of them sat on the jury, they must base their verdict on admitted evidence, only, and to disregard Megan N.'s statement.

This was not just plain error, it was structural error. The Ninth Circuit has found structural error in a case that involves a self-appointed "expert" in the jury pool making similar statements (the claims by children of sexual abuse are always

borne out). *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998). The prospective juror's statement affected the entire trial.

We acknowledge that all the seated jurors swore they would be fair. We are not questioning their sincerity. But no matter how sincere the jurors were, Megan N.'s statement likely was on their minds, because the statement was memorable. And the problem with that is what psychologists call "source confusion." During deliberations, after a long trial in particular, the memory of Megan N.'s statement, and the memory of the actual witnesses, merge.

This is the same psychological issue that is raised with pretrial publicity. A juror can sincerely swear that he will ignore the newspaper article about (for example) a now-suppressed smoking gun, but there is simply no way the human mind can erase memorable information. Human memory has evolved to integrate information from many sources to end up with a coherent pattern of knowledge. Human beings tend to lose track of what piece of information came from where; we may correctly remember information but be wrong about where it came from. We tend to be unaware that we are confused about where the memorable information came from. For this reason, there is no judicial admonition, or any other remedy, that can definitely remove memorable information from the jury's decision-making process, because the juror may not be aware that he is using impermissible

information. Reisberg, D., The Science of Perception and Memory (2014), Chapter 9, Juror's cognition, at 228-30.

At least with an immediate instruction, the remaining prospective jurors might be able to isolate Megan N.'s remarks from the evidence. However, the better remedy would be to strike that panel of 15 jurors.

The remedy for pretrial publicity is a change of venue: a drastic remedy. Here the remedy was simply to strike one of many panels of jurors, and start fresh. In balancing the remedies, that was the required choice to ensure a fair trial.

Conclusion

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

Respectfully submitted,

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