Docket No.

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 2020

JUAN FREDY HERNANDEZ-ZOZAYA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER IT IS A VIOLATION OF 18 U.S.C. § 2421(a), WHICH MAKES IT ILLEGAL TO TRANSPORT A PERSON ACROSS STATE LINES WITH THE INTENT FOR THAT PERSON TO ENGAGE IN PROSTITUTION, WHERE IT IS UNDISPUTED THAT THE PROSTITUTES ARRANGED AND PAID FOR THEIR OWN TRANSPORTATION ACROSS STATE LINES, AN ISSUE THAT HAS LED TO A CIRCUIT SPLIT.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. Juan Fredy Hernandez-Zozaya
2. United States of America

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PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Fredy Hernandez-Zozaya respectfully asks the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 10, 2020, in the captioned matter.

CITATIONS OF OPINIONS AND ORDERS

The unreported opinion of the United States Court of Appeals for the Third Circuit, affirming Petitioner's conviction in this matter, is attached as Exhibit A.

BASIS FOR JURISDICTION

Petitioner petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed on September 10, 2020. Jurisdiction to review such judgment by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2421(a) provides in relevant part:

> Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2422(a) provides in relevant part:

> Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> .... nor shall any person ... be deprived of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

The government charged Petitioner Juan Fredy Hernandez-Zozaya with running multiple brothels in the State of New Jersey. Specifically, on October 30, 2018, Petitioner was indicted in the District of New Jersey in a two-count Second Superseding Indictment with one count of conspiracy to transport an individual in interstate commerce for purposes of prostitution, contrary to 18 U.S.C. § 2421(a), in violation of 18 U.S.C. § 371, and one count of conspiracy to conceal,

harbor and shield from detection an alien for commercial advantage and private financial gain, contrary to 8 U.S.C. § 1324(a)(1)(A)(iii), in violation of 8 U.S.C. § 1324(a)(1)(A)(v)(I) and 8 U.S.C. § 1324(a)(1)(B)(i). On November 6, 2018, Defendant pleaded "not guilty" to all counts.

On January 9, 2019, Defendant went to trial before a jury. At trial, Department of Homeland Security SA Christopher Iatauro testified (in relevant part) that, on September 18, 2014, law enforcement executed search warrants at multiple brothel locations in New Jersey (10T at 50:17 to 87:25; 141:8-15) and arrested (and later charged) Petitioner and his girlfriend, Elizabeth Rojas Rojas, who went by the name "Diana" (10T at 36-37; 70). SA Iatauro also testified that, during the government's investigation, surveillance of the Trenton, New Jersey train station revealed that, on at least one occasion, one woman who worked in the brothels was picked up after she arrived at the train station *in New Jersey* and transported to a brothel *in New Jersey* (10T at 40:8 to 41:1).

Cristina Suerro Guerrero testified at trial that she lived in New York but worked as a prostitute in the New Jersey brothels. The government asked her how she traveled to/from the brothels in New Jersey and she testified: "By train and bus." (10T at 184:10-12). She also testified that, on occasion, after she arrived in Trenton, Diana would tell her to take a taxi to a brothel (10T at 175:19 to 176:24), and that Petitioner once picked her up *in Trenton* to take her to a brothel in Bridgeton, New Jersey. (10T at 186:17 to 187:14). Asked who paid for her transportation, Guerrero testified that she paid for her own "taxi and transportation." (10T at 168:9-11).

Jose Manuel Hernandez-Moreno (a/k/a "Manolo") testified that he worked for Petitioner (11T at 238-242), that "the majority" of the women he talked to at the brothels "came from Queens" (11T at 282:21-23), and that "they arrived [in New Jersey] by train or by bus and we would pick them up." (11T at 315:19-24). Asked to elaborate, Moreno testified: "Sometimes

Cocho or Diana would call me that the girl would be arriving in five minutes or was already at the train station, to have a taxi called to go pick her up." (11T at 283:10-15) (*see also* 11T at 282) ("Sometimes they arrived at the train station or bus station and we would go pick them up in a taxi."); 11T at 314:10-19 (testifying regarding recorded conversation that he knew woman was returning home to New York on her own "because she told me she was taking the train for there" after "she got a taxi from Asbury Park to Long Branch, to catch the other train that left from there")).

Nashielly Salinas Pacheco testified that she traveled from Queens, New York to work in brothels in New Jersey. (14T at 390-93). Asked about her first trip traveling from Queens to a brothel in Bridgeton, New Jersey, Pacheco testified: "I took a train. Afterwards on 42nd Street, I took a bus to Union City, and at stop 30 ... the person who was going to drive us to the location was waiting." (14T at 391:2-20).

The government introduced at trial text messages retrieved from Diana's telephone, which were read into the record by SA Iatauro. (10T at 99:4 to 110:5). Those texts corroborate that the women who worked in the brothels arranged their own transportation to train or bus stations in New Jersey and that, occasionally, they were then picked up at the stations, by taxis or other transportation arranged by a co-conspirator, and then transported within New Jersey. There was no evidence presented at trial that Petitioner or any other participant arranged or paid for transportation from New York to New Jersey for any prostitute.

On January 15, 2019, Petitioner was convicted of both counts. On June 19, 2019, the district court sentenced Petitioner to a 78-month term of imprisonment. On June 20, 2019, Petitioner filed a timely Notice of Appeal. On September 10, 2020, the Third Circuit affirmed Petitioner's conviction. *See* Ex. A (Slip. Op.).

REASONS CERTIORARI SHOULD BE GRANTED

THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER 18 U.S.C. § 2421(a) IS VIOLATED WHERE PROSTITUTES ARRANGED AND PAID FOR THEIR OWN INTERSTATE TRAVEL.

The United States Courts of Appeals have reached conflicting decisions with respect to whether a criminal defendant may be convicted of violating the Mann Act, 18 U.S.C. § 2421(a), where, as in this case, prostitutes arranged and paid for their own interstate transportation. As the D.C., First, Fifth, Seventh, Eighth and Ninth Circuits have held, *see infra*, there is a difference between "transporting" an individual in interstate commerce, which is the conduct criminalized by Section 2421(a), and enticing another "to travel" in interstate commerce, which is separate conduct criminalized by 18 U.S.C. § 2422(a) but not charged in this case. As those Circuits have recognized, the Third Circuit's holding in this case – that merely scheduling a person to work as a prostitute in another state is sufficient to prove the interstate transportation element of Section 2421(a), even in the absence of any evidence that the charged defendant transported or arranged for the transportation of the prostitute across state lines – is contrary to the plain terms of the statute and would make Section 2422(a) redundant. Therefore, a writ of certiorari should be granted to resolve this Circuit split, *see* S. Ct. R. 10(a); certiorari also is warranted because this petition presents "an important question of federal law that has not been, but should be, settled by this Court" relating to an often-used federal criminal statute. S. Ct. R. 10(c).

It is undisputed that, at trial, the government did not present any evidence that the participants in the charged conspiracy transported or arranged the transportation across state lines of any person for purposes of prostitution. Rather, the evidence at trial was that several women who lived in New York would arrange and pay for their own transportation from New York– by bus or train – to stations *in New Jersey* and that, on occasion, they would be picked up from those

stations *in New Jersey* and transported to brothel locations *within New Jersey*. Nevertheless, the Third Circuit affirmed Petitioner's conviction, holding that "Zozaya caused interstate travel for the purposes of prostitution by coordinating and prearranging the date and time on which women would travel interstate to work for him." Slip Op. at 6. *Accord United States v. Mi Sun Cho*, 713 F.3d 716 (2d Cir. 2013) (holding that "arranging transportation" for purposes of Section 2421(a) requires nothing more than "providing a prostitution job" and "coordinating and prearranging" the prostitute's work schedule).

This interpretation of Section 2421(a) – holding that setting the work schedule of a prostitute who then arranges and pays for their own transportation across state lines is sufficient to establish a violation of Section 2421(a) – is both wrong and in conflict with multiple other Circuits' decisions holding, in cases in which the charged defendants arranged prostitution jobs that necessarily required the prostitute to travel between states, that providing a prostitution job and *intrastate* transportation does not violate Section 2421(a), if the prostitute arranges for their own interstate transportation.

These holdings are consistent with the plain terms of the relevant provisions of the Mann Act. Section 2421(a) provides in relevant part as follows:

> Whoever knowingly transports any individual in interstate ... commerce ..., with intent that such individual engage in prostitution ... shall be fined under this title or imprisoned not more than 10 years, or both.

Petitioner was not charged with violating 18 U.S.C. § 2422(a), which provides in relevant part as follows:

> Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate ... commerce ... to engage in prostitution ... shall be fined under this title or imprisoned not more than 20 years, or both.

In contrast to Section 2422(a), which criminalizes interstate *travel* by another for purposes of engaging in prostitution, Section 2421(a) – by its plain terms – requires proof that the accused actually *transported* an individual across state lines; mere interstate travel by another, or mere *intrastate* transportation of another, is not sufficient (and is not a federal crime at all).

Thus, contrary to the Third Circuit's decision here, in *Twitchell v. United States*, 330 F.2d 759 (9th Cir. 1964), the Ninth Circuit reversed a Section 2421 conviction following the government's confession of error after a remand from this Court because the prostitute had arranged and paid for her own interstate transportation to a prostitution job provided by the defendant:

> We have examined the government's confession of error. It states that Wells paid for her own interstate transportation, and that [Defendant] Rogers cannot be held to have "counselled, commanded, or induced" such transportation, in violation of sections 2 and 2421 of title 18, U.S.C. This is because section 2421 only prohibits transportation of a woman by someone else; it is not an offense for the woman to transport herself. Consequently, it cannot be an offense, under section 2, to counsel, command, or induce her so to transport herself. We think that the government is correct. There is here no evidence that Rogers in any way participated in the actual transportation of Wells from Portland to Tacoma, although he did later participate in transporting her from Tacoma to Everett. The latter trip, however, was separate, and entirely intrastate. Thus the principles announced in *La Page* [sic] *v. United States*, 146 F.2d 536 [8th Cir. 1945], and followed in *Hill v. United States*, 150 F.2d 760 [8th Cir. 1945], are applicable here. The result might be different if count nine had charged a violation of section 2422, but it did not. We conclude that the judgment against Harrison Rogers under count nine cannot stand.

Twitchell, 330 F.2d at759-60.

In *Le Page v. United States*, *supra*, the Eighth Circuit held that where a woman made an interstate journey to a brothel at the defendant's request, but at her own expense, the defendant had not caused her unlawful transportation in violation of the predecessor to Section 2421:

> The evidence established that Dora Thomas (who was an inmate of a house of prostitution operated by appellant at Fargo, North Dakota) had gone to Minneapolis, Minnesota, for a vacation; that appellant telephoned her, one

> evening, to return as "one of her girls was leaving" and she would be expected early next morning; that it was understood by both women that Dora Thomas would return to Fargo next day by train; and that she did so return. Baldly, the evidence is that Dora Thomas made this interstate journey at her own expense because of appellant's telephone request and that both women understood the immoral purpose for which the trip was to be taken. Since there was no evidence that appellant gave any aid or assistance in obtaining the transportation, the sufficiency of the proof depends upon whether it shows that appellant *"did cause* [Dora Thomas] to be transported" within the meaning of section 2 of the Act.
>
> Appellant contends that where, as here, the only act of accused is that of persuading or inducing an interstate trip by common carrier for immoral purposes, such act is not *causing* such trip within the meaning of section 2 but is, if any crime, the one stated in section 3 of the Act, U.S.C.A. Title 18, § 399....
>
> In construing these provisions of the two sections, we start with the rules that a statute should be construed so as to give effect to all of its language and that a broad statutory provision will not apply to a matter specifically dealt with in another part of the same Act. Also, it has been determined that the two sections cover separate crimes.... [T]he sections are distinct ... and this distinction is between "causing to be transported", *etc.*, under section 2, and "persuading, inducing" *etc.*, to be transported under section 3 .... The only way to make that distinction effective and to preserve any effect to this part of section 3 is to eliminate as *causes* for transportation under section 2 the kinds of causation covered in section 3 by the expressions "persuade, induce, entice, or coerce."
>
> .... In short, if this evidence establishes also a crime under section 2, it must follow that any evidence sufficient to prove a crime under section 3 is likewise sufficient to prove a crime under section 2. Since section 3 is of similar and of narrower application than section 2, the inevitable result is that all meaning of section 3 is included in section 2 and section 3 states no crime not included in section 2. This is to strike out section 3 and give it no effect whatever. We think it is not our province thus to nullify a portion of an Act, by statutory construction, when it is possible to reconcile the two sections giving each a separate meaning and effect and thereby preserve both sections of the Act.

Le Page, 146 F.2d at 537-38 (reversing conviction and remanding for entry of judgment of acquittal).

Similarly, the D.C. Circuit, in *United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990), reversed the Mann Act conviction of a defendant who worked as a telephone dispatcher for an

escort service, taking telephone orders for escorts and then contacting the escorts to notify them of the names and addresses of their customers. The escorts, however, made their own travel arrangements and transported themselves. *Id.* at 536, 540.

> The Government argued that the business, aided by appellant acting as a dispatcher, was "so closely involved in the [women's] ongoing activities that it was the 'moving' or 'efficient' or 'effective' cause of the transportation." The evidence at trial showed, however, that the escorts made their own travel arrangements and, in a literal sense, transported themselves interstate, by car or subway; and the Government has never suggested that the escorts were either physically or psychologically coerced. Thus, notwithstanding the Government's insistence that "the conduct addressed here amounted to more than mere inducement of interstate travel," and that the enterprise "directed and controlled the activities of its 'escorts,'" there is a complete lack of relevant evidence to that effect. The Government emphasizes the support services that the enterprise provided, pointing out, for example, that "advertisements ... placed in publications that ensured a higher class of clients than commonly available to street prostitutes" made Congressional's "mode of operation more attractive than individual enterprise."
>
> We accept the Government's implicit premise that one need not physically carry or accompany a person interstate in order to "transport" her; it may be enough effectively to cause her to be transported, as would clearly be the case if one were to commission another to abduct her. The problem with the Government's theory is that the conduct it would characterize as direction and control also and better fits the description of a different and complementary offense. Another provision of the Mann Act penalizes one who "knowingly persuades, induces, entices, or coerces any individual to travel in interstate ... commerce ... to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense." 18 U.S.C. § 2422. If § 2421 is interpreted so broadly as to encompass inducement, then § 2422 would be redundant.
>
> The more felicitous rendering preserves a role for each section by confining § 2421 to cases in which the defendant can truly be said, personally or through an agent, to have performed the proscribed act of transporting; § 2422 covers those cases in which the defendant provides the motivation, ranging from persuasion to coercion, but the person then "travels" under her own steam, without need of anyone to "transport" her. This reading preserves the ordinary language, common-sense meaning of the distinction between "causing" and "inducing" unlawful transportation. It is also logical: the causing and inducing statutes together comprise a set that captures all instances in which a person crosses a state line, at the instance of the defendant, for an immoral purpose. The Government's interpretation

> of § 2421 is, in contrast, inconsistent with the language as well as the logic of the two provisions viewed together.

Id. at 540. Therefore, the D.C. Circuit reversed the defendant's conviction under Section 2421. *Id.* at 541 ("[I]n our view, the activities of the business in which the appellant participated may have induced the escorts to travel interstate but did not cause them to be transported within the meaning of § 2421.") (distinguishing cases). *See also United States v. Camuti*, 950 F.2d 72, 77 (1st Cir. 1991) (holding that defendant convicted of inducing interstate travel under Section 2422 could not have sentenced enhanced for violation of Section 2421 for transporting prostitute named Goldsmith because even though "Camuti provided the 'motivation' for Goldsmith's travel, ... using her own car, she 'travelled under her own steam without need of anyone to transport her.' *Jones*, 909 F.2d at 540. Thus, Goldsmith was not transported within the meaning of 18 U.S.C. § 2421."). *See also Nunnally v. United States*, 291 F.2d 205, 206 (5th Cir. 1961) (recognizing that "[t]he offense of causing transportation of a woman under § 2421 and the offense of inducing a woman to go in interstate commerce for immoral purposes under § 2422 constitute separate crimes. Under § 2422 it is inducing the transportation for the immoral purpose that is the crime, rather than the furnishing or procuring of the transportation as such. Hence, [under § 2422] for example, it is not necessary to establish that the accused pay for or provide the transportation.") (internal citations omitted); *Heitler v. United States*, 244 F. 140 (7th Cir. 1917) (holding that the furnishing of cab fare from a railroad station in the destination town to house of prostitution in that town did not constitute transportation in interstate commerce because the transportation arranged by the defendant was purely intrastate).

Perhaps the government here could have charged Petitioner with conspiracy to violate 18 U.S.C. § 2422(a). *It did not*. Here, it is undisputed that there was no evidence that Petitioner (or any other conspirator) transported a prostitute across state lines or arranged transportation of a

prostitute across state lines. Rather, the evidence at trial was that prostitutes who lived in Queens, New York would arrange (and pay) for their own transportation to New Jersey via bus or train. *Graham v. United States*, 154 F.2d 325 (D.C. Cir. 1946) (holding that mere inducement to travel for purpose of prostitution, when prostitute is likely to and does get transportation for herself, does not violate Section 2421(a)); *Hill v. United States*, 150 F.2d 760, 761 (8th Cir. 1945) (holding that evidence of a telephone request to travel is insufficient to prove that defendant caused someone to travel). The fact that, on occasion, *intrastate* transportation would be provided to prostitutes once they had already arrived *in New Jersey*, from bus or train stations *in New Jersey* to various brothels *in New Jersey*, does not support a conviction under Section 2421(a) because it does not involve the transportation of another in *interstate* commerce. Those Circuits that have adopted a complimentary interpretation of Sections 2421(a) and Section 2422(a) have gotten it right, whereas the Third Circuit's interpretation of Section 2421(a) would make Section 2422(a) superfluous.

The Second Circuit's decision in *Cho*, *supra* – which mirrors the Third Circuit's interpretation of Section 2421(a) – does not cite a single case that supports its conclusion that merely providing a woman with a prostitution job that requires her to cross state lines satisfies the transportation element of Section 2421(a) where the prostitute arranged her own interstate travel. To the contrary, *Cho* relies on *United States v. Holland*, 381 F.3d 80, 86 (2d Cir. 2004), which held that "[a] defendant will be deemed to have transport[ed] an individual under Section 2421 where evidence shows that the defendant personally or through an agent performed the proscribed act of transporting," a holding that belies the Second and Third Circuit's expansive interpretation

of Section 2421(a). Thus, *Holland* is consistent with the other Circuit's interpretation of Section 2421(a) discussed above.[1]

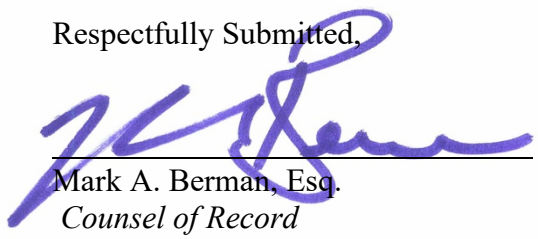
In sum, the Second and Third Circuits' interpretation of Section 2421(a) would make Section 2422(a) redundant and is contrary to the plain meaning interpretation afforded those statutes by the D.C., First, Fifth, Seventh, Eighth and Ninth Circuits, which have properly distinguished the criminal conduct encompassed by Section 2421(a) from that encompassed by Section 2422(a), by limiting the reach of the former to those cases in which the charged defendants actually transported or caused the transportation of prostitutes across state lines. Properly interpreted, no rational trier of fact could have found the essential elements of the crime of transporting an individual in interstate commerce, in violation of Section 2421(a) beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Because Petitioner's conviction was based upon insufficient evidence, in violation of his Fifth Amendment right to due process, this Court should issue a writ of certiorari to review the Third Circuit's decision, to resolve the Circuit split discussed above, and to reverse Petitioner's conviction.

[1] The only other case cited by the Second Circuit in *Cho* is the Fifth Circuit's decision in *United States v. Clemones*, 577 F.2d 1247, 1253 (5th Cir. 1978), where Priscilla Scott, a defendant who ran a brothel in Johnson City, Tennessee, was held to have aided and abetted a violation of the Mann Act by calling Thelma Ann Lunsford's pimp, Billy Johnson, in Rome, Georgia, where Lunsford was working as a prostitute, and arranging for Johnson to drive Lunsford across state lines from Rome to Chattanooga, Tennessee, where Lunsford took a bus to Johnson City to work for Scott. *Id*. at 1254. In rejecting Scott's argument that she did not personally transport Lunsford across state lines, the Fifth Circuit observed that her argument "overlooks the prearrangement consisting of the telephone call, *followed by the actual interstate transportation [by Johnson]* with the last leg terminating at Scott's house in Johnson City." *Id.* (emphasis added). Therefore, *Clemones* does not support the Second Circuit's decision in *Cho* or the Third Circuit's decision in this case. No other case law does either.

CONCLUSION

For these reasons, Petitioner Juan Fredy Hernandez-Zozaya respectfully asks the Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully Submitted,



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Dated: November 9, 2020

EXHIBIT A