

NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

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FRANK GALLARDO A/K/A FRANK RAY THUNDER HAWK

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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ON THE PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES OF APPEALS  
FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Whether a defendant charged with an offense under 18 USC § 2244 is entitled to a specific intent instruction and there is a conflict among Circuits.

## **PARTIES TO THE PROCEEDING**

Petitioner is Frank Gallardo a/ka/ Frank Ray Thunder Hawk, the defendant-appellant below.

Respondent is the United States of America, the plaintiff-appellee below.

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**PETITION FOR WRIT OF CERTIORARI**

Petitioner Frank Gallardo a/ka Frank Ray Thunder Hawk, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## **OPINION BELOW**

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit, which was published at 970 F3d 1042, was issued on August 17, 2020, and is reprinted in Appendix A to this Petition (“App.A”) at 1a-9a.

## **JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (a). The decision of the United States Court of Appeals for the Eighth Circuit for which petitioner seeks review was issued on August 17, 2020. This petition is filed within 90 days of the date that the Eighth Circuit Court of Appeals issued its judgment and opinion.

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

United States Constitution, Amendment 5, provides in pertinent part: No person shall be...deprived of life, liberty, or property, without due process of law.... .

United States Constitution, Amendment 6, provides, in relevant part: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

Federal Rules of Criminal Procedure 30, 18 U.S.C.A., directs in part as follows:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. ...The court shall inform counsel of

its proposed action upon the requests prior to their arguments to the jury. The court may instruct the jury before or after arguments are completed or at both times.

### **STATEMENT OF THE CASE**

Petitioner was indicted for and convicted of two counts of attempted and actual abusive sexual contact by intentional touching through the clothing of an Indian child less than 12 years of age with the intention to abuse, humiliate, harass, degrade, and arouse and gratify the sexual desire of any person in violation of 18 U.S.C. §§ 1152, 2244 (a) (5), and 2246 (3). The indictment is attached as Appendix B. Petitioner was sentenced to 72 months imprisonment.

The evidence at trial was that petitioner was in a marriage to the child's mother that was rocky in the least and tumultuous at its worst in the time immediately preceding the time frame of March, 2015, dates when the offenses allegedly occurred. It was alleged that on the first instance petitioner asked the child if she wanted to go with him on the tractor to feed cattle. While in the tractor, the child testified that she felt petitioner's middle on her behind through the clothing of both. A day or so later, the child testified that she was laying by petitioner playing around in the house with her mother present in the same room. While her mother went to the bathroom, the child testified that petitioner touched her vaginal area through the clothing. The child had previously been the victim in a sexual abuse case involving a different person where she offered testimony in that previous prosecution. Both incidents for which petitioner was convicted occurred in

Indian Country under 18 U.S.C. § 1153 on the Pine Ridge Indian Reservation in South Dakota.

Prior to and at the trial of the case, petitioner's counsel submitted and requested in writing that the jury be instructed on specific intent as follows as set forth in Appendix C:

In the crime of Abusive Sexual Contact of a Child, as charged in Count I and II of the indictment, there must exist in the mind of the defendant the specific intent to abuse, humiliate, harass, and degrade the alleged victim, or to arouse and gratify the defendant's sexual desire.

If the defendant acted without such specific intent, the crime of Abusive Sexual Contact as charged in the Indictment has not been committed.

The proposed instruction was refused. At the conclusion of the evidence, petitioner's attorney renewed the failure to give such instruction and the trial court stated "I will overrule your objection. Your objections, of course, are preserved for the record." Petitioner was convicted.

The district court over objection of petitioner's counsel instructed the jury as to the elements of the offenses as set forth in Appendix D.

#### **REASONS FOR GRANTING THE PETITION**

In *U.S. v. Castillo*, 140 F3d 874, 886 (10<sup>th</sup> Cir. 1998), it was held that 18 U.S.C. § 2244 contains a specific intent element that §§ 2242 and 2243 do not have.

*U.S. v. Velarde*, 214 F3d 1204, 1213 (10<sup>th</sup> Cir. 2000), cited *Castillo* with approval and reiterated that not only do §§ 2242 and 2243 not have a specific intent element, but neither does § 2241. In neither case then was a lesser included offense instruction under § 2244 justified because § 2244 has an element of specific intent not required under §§ 2241, 2242, or 2243. Accord, *U.S. v. Torres*, 937 F2d 1469, 1477-1478 (9<sup>th</sup> Cir. 1991) and *U.S. v. Hourihan*, 66 F3d 458, 465 (2<sup>nd</sup> Cir. 1995). The Second, Ninth, and Tenth Circuits all agree that § 2244 is a specific intent crime. By the Eighth Circuit's decision and instructions in the present case it is clear that the Eighth Circuit law is contrary to those of the Second, Ninth, and Tenth Circuits. See also *U.S. v. Demarrias*, 876 F2d 674, 676-677 (8<sup>th</sup> Cir. 1989).

A specific intent crime requires a specific intent instruction. In the present case, there must exist in the mind of the defendant the specific intent to abuse, humiliate, harass, degrade, arouse, or gratify as set forth in the proposed instruction at Appendix C. Indeed a different District Court in South Dakota gave the exact specific intent instruction in a prosecution under § 2244 that was proposed by petitioner in the present case but rejected. *U.S. v. James Wade Henry, Sr.*, 15-CR-30199 (D.S.D. 2016) (Jury Instruction 13). And the instruction that was given by the district court here instructed the jury that “(t)he government is not required to prove the defendant knew his acts or omissions were unlawful” which amounts to a nullification of any specific intent requirement.

Petitioner was charged in both counts of the indictment with having “knowingly engage(d) in and attempt to engage in sexual contact and cause or attempt to cause sexual contact.” He was charged with both an attempt and an intentional touching. Attempt is a specific intent crime. Requiring that something intentional be done requires a showing of specific intent. An instruction on “knowingly,” as given in this case, is not the same and is a lesser standard to prove than specific intent.

The facts giving rise to petitioner’s conviction are weak amounting to no more than a touching in a matter of seconds as to both incidents; no physical evidence or substantiation of complaining witness’s allegations; and under circumstances where the witness could have been coached by her mother, all of which made the need for a specific intent instruction as proposed crucial to a fair trial as argued by trial counsel in the trial court. The failure to give the specific intent instruction proposed, made worse by the instruction actually given, deprived petitioner of a fair trial and the right to have the jury be instructed on the correct law in deciding the case. An instruction on “knowing” given as set forth in Appendix D is not comparable to the burden that the government would have to shoulder to prove “specific intent.”

## CONCLUSION

Petitioner urges this Court to review petitioner's conviction to clarify that § 2244 is a specific intent crime requiring a "specific intent" rather than a "knowing" instruction and to resolve the conflict on that issue between the Circuits.

Dated November 9, 2020.

Respectfully submitted,

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