IN THE SUPREME COURT OF THE UNITED STATES

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TERRANCE TYRELL EDWARDS,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTIONS PRESENTED FOR REVIEW

1. Is evidence that establishes only the use of cellular telephones, the Internet or hotels by a defendant, without any evidence of how the use of these means, facilities or businesses were "in or affect[ed] interstate commerce," sufficient to find the interstate commerce element for commercial sex trafficking under 18 U.S.C. § 1591(a)?

2. Does a jury instruction that directs the jury that, "as a matter of law," the interstate commerce element for commercial sex trafficking in 18 U.S.C. § 1591(a) is met if the jury finds beyond a reasonable doubt that the offense involved the use of cellular telephones, the Internet or hotels constitute a conclusive presumption that violates a criminal defendant's right due process?

   a. If such an instruction is erroneous in that it contains an unconstitutional conclusive presumption, is that error obvious or plain as contemplated under the plain error standard of review?

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Petitioner, TERRANCE TYRELL EDWARDS (hereinafter Edwards) respectfully prays that a writ of certiorari issue to review the unpublished memorandum of the United States Court of Appeals for the Ninth Circuit entered on December 9, 2020, affirming his convictions.

OPINION BELOW

On December 9, 2020, the Ninth Circuit Court of Appeals entered an unpublished memorandum upholding Edwards's convictions on three counts of interstate sex trafficking pursuant to 18 U.S.C. § 1591(a). The memorandum is attached in the Appendix (App.) at pages 1-5. The Ninth Circuit denied a petition for rehearing and suggestion for reheairng *en banc* on February 17, 2021. App. 6. This petition is timely.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

Subsection (a) of Section 1591 of Title 18 of the United States Code states:

> (a) Whoever knowingly--
>
> > (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or
> >
> > (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
>
> knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in

subsection (b).

18 U.S.C.A. § 1591(a).

STATEMENT OF THE CASE

Edwards was tried and convicted by jury on three counts of commercial sex trafficking by force or fraud in violation of 18 U.S.C. § 1591(a), Counts I, II and XI of the fourth superseding indictment.[1] In order to sustain a conviction for commercial sex trafficking under § 1591(a), a defendant's offense conduct must have been "in or affect[ed] interstate or foreign commerce." 18 U.S.C. § 1591(a).

On appeal, Edwards challenged the sufficiency of evidence on the interstate commerce element of § 1591(a). He claimed that evidence of the use of cellular telephones, the Internet or hotels alone, without evidence of how they impact interstate commerce, is not sufficient proof for a jury to find the interstate commerce element had been met for commercial sex trafficking.

Edwards also claimed that the district court improperly directed the jury to find the interstate commerce element of § 1591(a) by giving an unconstitutional mandatory presumption instruction. Jury Instruction No. 52 stated in pertinent part:

> In determining whether the defendant's conduct was "in or affected interstate or foreign commerce," you may consider whether the defendant used means or facilities of interstate commerce, such as telephones, the Internet, or hotels that service interstate travelers, or whether his conduct substantially affected interstate commerce by virtue of the fact that he purchased items that moved in interstate commerce.
>
> The United States has offered proof that the sex trafficking crime involved use of cellular telephones, the internet, and hotels. If you unanimously agree that any one or all of these facts have

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[1] Edwards is currently serving a 30-year term of imprisonment.

> been proved beyond a reasonable doubt, then *as a matter of law* the crime has affected interstate commerce.

App. 18-19 (emphasis added). Edwards did not object to this instruction at trial.[2]

At trial, the government offered evidence of Edwards's use of cellular telephones, the Internet and hotels. The government offered nothing beyond the mere use of these items to establish the interstate commerce element.

For example, the victim of Count I testified that she and Edwards rented a hotel where she engaged in commercial sex. (ERIV 599, 612, 659).[3] The government presented no evidence to the jury on how the hotels had at least a minimal affect on interstate commerce.

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[2] Edwards pursued this issue before the Ninth Circuit on a plain error standard of review. The Ninth Circuit initially concluded that the district court did not commit plain error by submitting Instruction 52. App. 2. The Ninth Circuit then concluded that, even if Instruction 52 was erroneous, the error did not affect Edwards's substantial rights. *Id.* To meet with plain error standard appeal court's must find (1) error; (2) that error must be plain or obvious; and (3) the plain error must affect the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). A decision to correct a forfeited error under the plain error standard is within an appeal court's discretion and this discretion should not be exercised "unless the error seriously 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings'" *Id.* at 732 (citing *United States v. Young*, 470 U.S. 1, 15 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157 160 (1936)).

This petition requests the Court to resolve the questions of whether Instruction 52 contains an erroneous unconstitutional conclusive presumption; if so, whether the error was plain. Edward's maintains that should the Court determine from question 1 that § 1591(a) required more proof than the use of the use of cellular telephones the Internet or hotels, the evidence on as least two counts, Counts II and XI, was insufficient, thus, affecting Edward's substantial rights which affected the fairness, integrity and pubic reputation of the judicial proceedings. Thus, the case should be remanded to the Ninth Circuit to analyze the error separately for Count I, II and XI to determine if the plain error affected substantial rights and to determine whether it should exercise the discretion to correct the error on any count that survives the sufficiency challenge from question 1.

[3] "ERIV" is Excerpts of Record IV. There are eight volumes of the Excerpts of Record filed in the Ninth Circuit, designated, ERI, ERII, ERIII, ERIV, ERV, ERVI, ERVII, and ERIII.

In addition, the victim of Count I testified that Edwards posted ads on the internet in a platform called "Backpage" in Missoula, Montana . *Id.* 602. Edwards provided her with a cell phone. *Id.* at 645. She also testified that Edwards advertised her and the victim of Count VIII on Backpage in Billings, Montana, after she traveled there with Edwards and the victim of Count VIII to engage in commercial sex. *Id.* at 624.

The victim of Count II testified that Edwards posted ads for her on Backpage. (ERIII 260-61). She used a cell phone to speak directly to customers. (ERIII 262-63). She testified that some of the conduct occurred at hotels. (ERIII 277, 324).

The victim of Count XI testified that she was being advertized on Backpage. (ERIII at 415). She engaged in commercial sex at a Rodeway Inn in Billings, Montana. *Id.* 406,411). She indicated Edwards used a cell phone to set up the dates for her. (ERIII 450).

The government called three agents from the Federal Bureau of Investigation to testify about their analysis of phone and internet data from a cell phone and a laptop seized from Edwards. The data from both items supported the victims descriptions of activities in their testimony, including the hotels used in Missoula and Billings, and the Backpage ads.

However, none of the agent's testimony established how the use of cell phones, the Internet or the hotels affected interstate commerce. For example, Agent Kennedy testified that Edwards's phone was tracked on cell phone towers near various hotels in Missoula, particularly tower 230 in Missoula, consistent with the victims' testimony for Counts I and II. (ERV 825). Kennedy testified about data consistent with travel from Missoula to Billings, Montana, as the victim of Count XI testified. *Id.* 826.

Agent Kennedy never testified about how the use of the cell phone in relation to the towers in Missoula and Billings affected interstate commerce. His testimony established that a "cell phone makes or receives a phone call [and] ... talks to the tower in the sector." From "the sector, it then gets routed into the network -- in this case, Verizon itself -- where it creates a billable event..." Agent Kennedy emphasized that "even though we're most likely using the same tower and sector, it's still going to go in through the network, into the tower, into the network, and then back out. The cell phone wouldn't be talking to your phone directly from this 10 feet away, if that makes sense." *Id.* at 832. Agent Kennedy's testimony did not establish that "routed into the network" meant any relationship with, or how it might affect, interstate commerce. *Id.*

Likewise, Agent Salacinski and Agent Walter analyzed data in relation to Backpage. Agent Salacinski testified that Edwards's cell phone and laptop accessed Backpage regularly and on multiple occasions between April 2016 and September 2016. (ERV 862-64).

Agent Walters testified that Edwards's laptop information included "Billings.backpage.com/femaleescorts." *Id.* at 866. The information on Edwards's cell phone included "Billings escorts - backpage.com" *Id.* 883. None of the testimony from either agent established how Edwards's use of Backpage for Billings or Missoula on the internet affected interstate commerce.

Agent Walters also located data on Edwards's cell phone consistent with Edwards's use of the Rodeway Inn in Billings, and the Howard Johnson hotel in Missoula. (ERV 1010). Again, none of the testimony established how these hotels affected interstate commerce beyond the fact that Edwards used them.

During closing argument, the prosecutor argued , "[y]ou have a jury instruction that the use of the Internet or cell phones satisfies" the interstate commerce element. The government argued that evidence of "Backpage ads and [that the] Internet was utilized with respect to all three victims, [the] interstate commerce [element] is satisfied." (ERVIII 1483).

If the jury found that the government presented evidence beyond a reasonable doubt that Edwards's conduct in Counts I, II and XI involved use of cellular telephones, the Internet or hotels, Jury Instruction 52 told the jury that the interstate commerce element was satisfied as a matter of law. This instruction essentially commanded the jury to find the interstate commerce element of the offenses so long as certain facts were presented at trial.

In relation to both of the questions presented here, the Ninth Circuit held,

> The district court did not commit plain error by instructing the jury that the use of the internet, a cell phone, or a hotel room necessarily has at least a *de minimis* effect on interstate commerce, as required for conviction under 18 U.S.C. § 1591(a). Even if the instruction was erroneous, the error did not affect Edwards' substantial rights. The jury heard evidence that Edwards traveled between multiple states in connection with his sex trafficking activities, and that as he did so, he booked hotels in which his victims worked and used his cell phone and computer to post ads for their services on the internet. Edwards has therefore not established a reasonable probability that the alleged error affected the outcome of his trial. For the same reason, we reject Edwards' sufficiency of the evidence challenge to this element of the offense. The jury heard more than adequate evidence to find at least a *de minimis* effect on interstate commerce.

App. 2 (citations omitted).[4]

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[4] It is critical to this petition that the only commercial sex trafficking count that involved any evidence of travel was in relation to Count I. The alleged victim in Count I was "J.XXXXX." App. 10. In closing argument the government acknowledged that only "J.R. [was] trafficked across state lines." (ERVIII 1483). There was no evidence of interstate transportation relating to the alleged victims of Counts II and XI. This Ninth Circuit did not differentiate the

REASONS FOR GRANTING THE WRIT

1. Resolution of the question of whether evidence that establishes only the use of cellular telephones, the Internet or hotels by a defendant, without any evidence of how the use of these means, facilities or businesses were "in or affect[ed] interstate commerce," sufficient to find the interstate commerce element for commercial sex trafficking under 18 U.S.C. § 1591(a) is an important federal question that has not, and should be, resolved by the Court. The Court has taken the opportunity in the context of other federal criminal statutes to define the evidentiary requisites that satisfy the commerce clause element. This case presents the Court with another opportunity to determine what type of evidence is necessary for the Government to prove beyond a reasonable doubt that a defendant's conduct, when tried for commercial sex trafficking, was "in or affected interstate commerce" as required in 18 U.S.C. § 1591(a).

The Court's decision in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1969) is instructive. *Heart of Atlanta Motel* involved a declaratory action brought by the motel to enjoin enforcement of the Civil Rights Act of 1964 (the Act). *Id.* at 242-43.

The Act prohibited motels from refusing to rent rooms based on "race, color, religion, or national origin." *Id.* at 247. The motel refused to rent rooms to African Americans, and alleged

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evidence for each count of commercial sex trafficking when it affirmed Edward's convictions.

On appeal, Edwards argued the evidence of travel on Count I was insufficient and did not prove that he drove the vehicle that crossed state lines, therefore, he did not transport the alleged victim of Count I in interstate commerce as required under § 1591(a). The Ninth Circuit never addressed this precise argument. Whether or not Edwards's travel with the alleged the victim was sufficient to sustain his conviction on Count I could be resolved on a remand if this petition is accepted and an outcome favors Edwards. The questions here, however, impacts all three counts charging commercial sex trafficking.

in the action that it intended to continue this practice. *Id.* at 243. The motel claimed that Congress exceeded its power under the Commerce Clause, claiming Congress was taking its liberty and property without due process and due compensation. *Id.* at 243-44.

The Supreme Court concluded Congress did not exceed its authority under the Commerce Clause. The Supreme Court held that "

> the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."

Id. at 258.

The evidence established that the motel had "216 rooms available to transient guests;" the motel is located on downtown streets and "is readily accessible to interstate highways; the motel solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation;" the motel "maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of the State." *Id.* at 243.

Heart of Atlanta Motel offers insight into the type of evidence that will satisfy the interstate commerce element when individual uses hotels when charged under § 1591(a). *Id.* None of that type of evidence was admitted in this case in relation to the hotel Edwards used to conduct his alleged criminal activity. *See, e.g., United States v. Young*, 955 F.3d 608, 613 (7th Cir. 2020) ("Young has a compelling argument, ... [where] [t]he government presented little to no credible evidence of the interstate nature of the hotels used...").

Other circuits seem to require evidence that the "hotels []serviced interstate travelers." *See, Koech*, 992 F.3d at 693 (approving district court's jury instruction). *Young*, 955 F.3d at 612-13 (same); *Phea*, 755 F.3d at 266 (Fifth Circuit's Pattern Jury Instruction); *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) ("Evans's use of hotels that served interstate travelers ... are further evidence that Evans's conduct substantially affected interstate commerce."). Here, the Government offered no evidence that the hotels involved in the activity "served interstate traveler" as appears to be a minimal requisite in other circuits.

Circuit court decisions, as well as decisions in the Ninth Circuit, offer insight into the type of evidence that should be required to establish that use of the Internet or use of cellular telephones was "in or affect[ed] interstate commerce. For example, in *United States v. Walls,* 784 F.3d 543 (9th Cir. 2015), the government produced testimony from a detective that the website used by the defendant, during the commercial sex trafficking activities, had servers in Texas and Amsterdam. The crimes occurred in the Western District of Washington. *Id.* at 544-45. The sex trafficking crimes involved Craigslist. *Id.* at 545. An employee from Craigslist testified that Washington State users of that service would have to access the website through Arizona or California. *Id.*

None of this type of evidence was presented by the government at Edwards's trial in relation to cellular telephone and Internet use. Jury Instruction 52 permitted the jury to find the jurisdictional element without having to find facts on how use of cellular telephones, or the use of the Internet may have affected interstate commerce.

Similarly, the Ninth Circuit's decision in *United States v. Costanzo*, 956 F.3d 1088 (9th 2020) is illustrative. In *Costanzo*, this the Ninth Circuit found that the government proved the

"'minimal' interstate nexus" for money laundering in violation of 18 U.S.C. § 1956(a). *Costanzo*, 956 F.3d at 1092-93. There the government proved that the defendant "used global platforms" and "advertised his business through ... a website based outside the United States." *Id.* *Costanzo* held that "a defendant's creation of a website in one state, maintenance of that site in another, and evidence that the website was uploaded to servers in several other states" was sufficient to establish the interstate commerce element for § 1956(a). *Id.* at 1092 (citing *United States v. Pirello*, 255 F.3d 728, 729-30 (9th Cir. 2001)).

In *United States v. Koech*, 992 F.3d 686 (8th Cir. 2021), the Government proved that the cellular telephone the defendant used during his criminal activity was manufactured in China. *Id.* at 693. In *United States v. Campbell*, 770 F.3d 556 (7th Cir. 2014), the government presented evidence that the defendant "purchased supplies and promotional materials from out-of-state, ordered satellite television, internet and telephone service from out-of-state companies..." *Id.* at 575. None of this type of evidence was admitted during Edwards's trial in relation to the cellular telephones or the web pages used during his activities.

There was no evidence that the cellular telephones used in this case transmitted the signal outside of Montana or went to a server outside of Montana. There was no evidence that the Backpage websites made by Edwards utilized servers outside of Montana. There is was no evidence that Edwards ordered or used cellular telephone services or Internet services from companies out of state.

In *Campbell*, the Seventh Circuit did not reach the issue of whether evidence of use of cellular telephones or the Internet *alone* is sufficient to establish the interstate commerce element for § 1591(a). *Id.* at 574 (emphasis added). The Seventh Circuit recognized that the Ninth

Circuit's decision in *Untied States v. Todd,* 627 F.3d 329, 333 (9th Cir. 2009) seems to hold that "internet and mobile phone usage is alone sufficient to satisfy the interstate commerce element of [1591(a)]." *Id.* Later, the Seventh Circuit in *Young* approved a district court's instruction on the interstate commerce element for § 1591(a) that included an instruction stating that this element would be satisfied "if the commercial sex activity involved use of hotels that served interstate traveler, or involved the use of the Internet to place advertisements." *Young*, 955 F.3d at 613-14.

Other circuit cases also seem to suggest that evidence of internet and mobile phone usage alone satisfies the interstate commerce element. *See*, *United States v. Phea*, 755 F.3d 255, 266 n. 32 (5th Cir. 2014) (citing *United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) ("holding interstate nexus satisfied because of use of the Internet"); *United States v. Marek*, 238 F.3d 310, 318 (5th Cir. 2001) ("noting that telephones are facilities of interstate commerce that can create "a federal criminal federal jurisdictional nexus during intrastate use.").

From review of the case law that is developing among the courts of appeals, the Court's direction on what constitutes sufficient evidence to establish the interstate commerce element under § 1591(a) is needed. The current case law from the lower courts is not clear nor uniform in that regard. It is unclear from review of the cases whether evidence of the use of cellular telephones, use of the internet or use of hotels alone, without any additional evidence of how these means, facilities or businesses impact interstate commence, is sufficient.

This case presents an ideal vehicle for the Court to resolve the question of what constitutes sufficient evidence to establish the commerce clause nexus for prosecutions brought under § 1591(a). The Court in the past has resolved similar issues involving different federal criminal statutes.

For example, the Court in *Scarborough v. United States*, 431 U.S. 563 (1977) resolved the question of what evidence was sufficient to prove the interstate commerce element for 18 U.S.C.A. App. § 1202(a), felon in possession of a firearm. *Id.* at 564.[5] Section 1202(a) prohibited convicted felons from receiving, possessing, or transporting "in or affecting commerce ... any firearm." *Id.* The Court affirmed the Fourth Circuit that "held the interstate commerce nexus requirement of the possession offense was satisfied by proof that the firearm petitioner possessed had previously traveled in interstate commence." *Id.* at 566.

In *Taylor v. United States*, __U.S.__, 136 S. Ct. 2074 (2016), the Court resolved a question of what evidence is sufficient to satisfy the commerce clause element contained in 18 U.S.C. § 1951(a), Hobbs Act robbery, "in cases involving the theft of drugs and drug proceeds from drug dealers." *Id.* at 2079. The Court held that evidence establishing "a defendant knowingly stole or attempted to steal drugs or drug proceeds" from a drug dealer was sufficient to establish the interstate commerce element. *Id.* at 2081. The Court also held that "the Government need not show that the drugs that a defendant stole or attempted to steal either traveled or were destined for transport across state lines." *Id.* The Court reasoned that, "as a matter of law, the market for illegal drugs is "commerce over which the United States has jurisdiction." *Id.*

Section 1591(a) has different commerce clause implications. Commercial sex trafficking may be completely local activity without any interstate commerce connection. Thus, § 1591(a) requires that there be some connection to interstate commerce such that the jury can determine

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[5] 18 U.S.C.A. App. § 1202(a) was the predecessor statute to the current felon in possession statute in 18 U.S.C. § 922(g)(1).

whether the commercial sex activity was "in or affect[ed] interstate commerce." Without evidence that shows how the use of a cellular telephone, the use of the Internet or the use of a hotel impact interstate commerce, the jury is left without any factual basis upon which to find an interstate commerce connection on evidence of use of these items alone.

Requiring the Government to put forth evidence, beyond the mere use of these means, facilities or businesses, to establish an interstate commerce connection is not an onerous requirement. *See, e.g, Young*, 955 F.3d at 613 ("The government presented little to no credible evidence of the interstate nature of the hotels ... [and] such information is no doubt readily available..."). Cases cited previously make the point. *See, Walls*, 784 F.3d at 544-45 (evidence that website had servers in Texas and in Amsterdam; Craigslist users had access to the website in Arizona and California, where crime occurred in Western Washington); *Koech* 992 F.3d at 693 (cellular phone manufactured in China); and *Campbell*, 770 F.3d at 575 (supplies and promotional material ordered from out-of-state suppliers, satellite televison, internet and telephone services from out-of-state companies).

The Court should take this opportunity to resolve the question of what evidence the Government is required to put forth to establish the interstate commerce element in § 1591(a). In this case, the Government presented no evidence beyond the mere use of cellular telephones, the Internet and hotels. No evidence was offered to show how such use had any connection to interstate commerce. Therefore, this case offers the Court an excellent vehicle to address and resolve the question.

2. Resolution of the question of whether a jury instruction that directs the jury that, "as a mater of law," the interstate commerce element for commercial sex trafficking in 18 U.S.C. § 1591(a) is met if the jury finds beyond a reasonable doubt that the offense involved the use of cellular telephones, the Internet or hotels creates a conclusive presumption that violates a criminal defendant's right to due process is important to effectuate the uniform application of the Court's precedence among the lower courts. This petition raises an important constitutional question that was decided by the Ninth Circuit in a way that deviates from, and conflicts with, relevant decisions from the Court.

The Court long ago "explicitly" announced "that the Due Process Clause protects the accused against conviction, except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). "This 'bedrock, 'axiomatic and elementary; [constitutional] principle, ... prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of the burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (quoting *Winship*, 397 at 363) (citing *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979); *Patterson v. New York,* 432 U.S. 197, 210, 215 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 698-701 (1975); and *Morissette v. United States,* 342 U.S. 246, 274-75 (1952)).

The initial step in determining the constitutionality of a jury instruction is to "determine the nature presumption is describes." *Franklin*, 471 U.S. at 313-14 (quoting *Sandstrom*, 442 U.S. at 514). In other words, "[t]he Court must determine whether the challenged portion of the instruction creates a mandatory presumption, ... or merely creates a permissive inference."

Franklin, 471 U.S. at 314 (citing *Sandstrom*, 442 U.S. at 520-24; and *Ulster County Court v. Allen*, 442 U.S. 140, 157-63 (1979)).

"A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts," whereas, "[a] permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion." *Franklin*, 471 U.S. at 314. Mandatory presumptions "violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of the offense. *Id.* (citing *Patterson* 432 U.S. at 215). [6]

There are two types of mandatory presumptions. The first is a "conclusive presumption." *Id.* at 314 n. 2. Such presumption "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption." *Id.*

The second is a "rebuttable presumption." This type of presumption "does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted." *Id.* (citing *Sandstrom*, 442 U.S. at 517-18).

The starting point in the analysis focuses on "the specific language challenged." *Franklin*, 471 U.S. at 315. "If a specific portion of the charge, considered in isolation, could reasonably have been understood as creating a presumption that relieves the State of its burden of persuasion on an element of an offense, the potentially offending words must be considered in

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[6] *Franklin* further describes an instruction involving a permissive inference as one that "does not relieve the State of its burden of persuasion" and does not violate the Due Process Clause unless "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Id.* at 314-15 (citing *Ulster County Court*, 442 U.S. at 157-63). This case does not involve a permissive inference instruction.

the context of the charge as a whole." *Id.* A review of the instructions as a whole may reveal that other instructions "explain the particular infirm language to the extent that a reasonable juror could not have considered the charge to have created an unconstitutional presumption. *Id.* (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). Finally, the "analysis requires careful attention to the words actually spoken to the jury ..., for whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction." *Id.* (citing *Sandstrom*, 442 U.S. at 514).

Here, the jury likely and reasonably understood that Jury Instruction 52 directed it to find the interstate commerce element had been met, so long as it was unanimous in finding a predicate fact had been proved by the Government beyond a reasonable doubt. The predicate fact set out in Instruction 52 was a requirement that the Government produced evidence of the use of cellular telephones, the Internet or hotels. In fact, Instruction 52 told the jury that the Government offered evidence of the use of cellular telephones, the Internet and hotels. Instruction 52 further instructed that this evidence offered by the Government satisfied the interstate commerce element "as a matter of law." App. 18-19.

Nothing from a review of other instructions mitigated the conclusive presumption contained in Instruction 52. App. 9-19 (instructions on the elements of commercial sex trafficking). Indeed, Jury Instruction 17 specifically commands the jury that "[i]t is your duty to apply the law as I give it to you to the facts as you find them ... [and] [y]ou must decide the case solely on the evidence and the law." App. 7-8. This general instruction on the duty to apply the law as given by the district court further adds to the conclusive presumption in Instruction 52. Including the language "as a matter of law" after outlining what evidences establishes the

commerce clause element took away all independence from the jury to consider and determine whether the Government had proved the interstate commerce element beyond a reasonable doubt. *See*, *Franklin*, 471 U.S. at 314 n. 2 (Instruction 52 "remove[d] the presumed element from the case once the [Government] proved the predicates facts giving rise to the presumption.").

a. The conclusive presumption in Jury Instruction 52 is plain and obvious error.

The previous cases from the Court establish that Instruction 52 contained a conclusive presumption that violated Edwards's right to due process. *See*, *Id.* at 314; *Sandstrom*, 442 U.S. at 210-24. This longstanding principle establishes that the error in Instruction 52 is plain and obvious. *See*, *Olano*, 507 U.S. at 733-35. A determination of whether this plain error affected substantial rights largely depends on a resolution of the first question presented. *Id.; see also*, footnote, 2, *supra*.

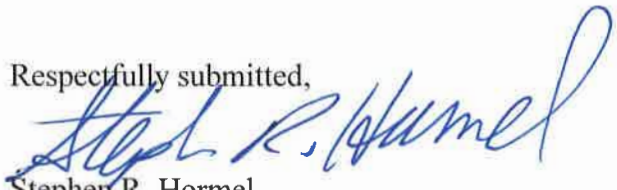
Therefore, the Court should take the opportunity to resolve this question in conjunction with the first question. This case presents the Court with an ideal vehicle to define the appropriate evidentiary requirements for the interstate commerce element of § 1591(a). This includes an excellent opportunity to guide the lower federal courts on the appropriate jury instructions for the commerce clause element of § 1591(a).

CONCLUSION

Based on the foregoing, it is requested that this Court grant this petition for writ of certiorari.

Dated this 16th day of July, 2021.

Respectfully submitted,



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