

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AMOS KIPROP KOECH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Does the jurisdictional element “in or affecting interstate commerce” in federal criminal statutes require an actual effect on interstate commerce and thus entitle a defendant to a jury instruction that the government must prove beyond a reasonable doubt an “actual effect” on interstate commerce?
- II. Is the interstate commerce jurisdictional element requiring that the crime be “in or affecting interstate commerce” satisfied by mere use of a cell phone in a case that otherwise involves a local sex crime?

LIST OF PARTIES

All parties appear in the caption on the cover page of this Petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Amos Koech respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is published as *United States v. Koech*, 992 F.3d 686 (8th Cir. 2021), and is reprinted in the Appendix to this Petition. (App. 1-7).

JURISDICTION

The Eighth Circuit Court of Appeals issued its decision on March 26, 2021. (App. 1). By order dated March 19, 2020, this Court extended the deadline for filing of a petition for certiorari “to 150 days from the date of the lower court judgment, order denying discretionary review or order deny a timely petition for rehearing.” Hence, this Petition is timely. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This petition involves the Commerce Clause of the United States Constitution, which provides:

U.S. Const., Art. I, § 8, cl. 3

The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes

The petition also involves 18 U.S.C. § 1591(a), which provides, in relevant part:

Whoever knowingly -- (1) in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits . . . a person . . . knowing, or . . . in reckless disregard of the fact . . . 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).

STATEMENT OF THE CASE

This case involves the jurisdictional reach of the interstate commerce clause for a conviction involving a customer who was convicted of “sex trafficking of a minor” in violation of 18 U.S.C. § 1591(a).¹ The interstate nexus for the conviction was that Mr. Koech made several phone calls and texts with a local acquaintance (his co-defendant) in Duluth, Minnesota. The co-defendant walked a few blocks to Mr. Koech’s apartment with a minor female, and Mr. Koech paid \$60 and engaged in sexual acts with her. There was no interstate travel, interstate communication, interstate banking activity, etc. associated with this local sex transaction. The evidence at trial suggested that happened twice; the second instance likewise had no interstate involvement.

Concerning the interstate commerce element of the offense, the defense requested a jury instruction requiring that the government must prove beyond a reasonable doubt that the defendant’s conduct had an **actual effect** on interstate commerce, as follows: “You must decide whether the defendant’s conduct had an **actual effect** on interstate commerce, which can be minimal. However, the defendant’s effect on interstate commerce must be **actual**, and not merely probable or potential.” (Opinion, App. p.8 (emphasis added)). The court denied that request,

¹ Mr. Koech was also charged and convicted of conspiracy to engage in sex trafficking of a minor in violation of 18 U.S.C 1594(c); his co-defendant pled guilty and Mr. Koech was tried alone. This petition concerns Mr. Koech’s single substantive count of sex trafficking of a minor, for which he was charged alone. The sex trafficking statute was amended several years ago to encompass mere customers, such as Mr. Koech. The statute carries a ten-year mandatory minimum sentence, and Mr. Koech received a sentence of 130 months imprisonment.

instead providing an instruction that it was sufficient if the government showed the defendant's actions were "in or affecting interstate commerce, to any degree, however minimal." The court's lengthy instruction did not advise the jury that the government must prove an "actual effect":

Acts and transactions which are economic in nature and cross state lines are "in" interstate commerce. Transporting people across state lines for a commercial purpose is interstate commerce. Acts and transactions which are economic in nature and affect the flow of money in the stream of commerce to any degree, however minimal, "affect" interstate commerce. . . .

If you find beyond a reasonable doubt that the defendant's recruitment, enticement, harboring, transportation, providing, obtaining, maintaining, patronizing, or soliciting of [C.D.] for the purpose of engaging in commercial sex acts was "in or affecting interstate commerce," to any degree, however minimal, you may find the third element . . . has been satisfied. If you do not so find, then this element has not been established. (App. pp. 8-9).

Mr. Koech argued on appeal that the court's jury instructions were inadequate to convey the federal jurisdictional requirement that the government prove an "actual affect" on interstate commerce, and that the mere involvement of his cellphone was insufficient to sustain the government's proof that the offense have an "actual effect" on interstate commerce. The Eighth Circuit rejected both arguments and sustained the conviction. (App., Opinion, pp. 7-12).

REASONS FOR GRANTING THE PETITION

Petitioner respectfully requests that the Court accept review of the questions presented because they pose an important jurisdictional issue that has a weighty impact upon the administration of criminal justice. This case also presents an apt vehicle by which to address and resolve the question.

A. The question is important to the administration of criminal justice

This case involves the outer limits of federal criminal jurisdiction for cases that arise under the “affecting interstate commerce” prong of the interstate commerce clause of the United States Constitution. The case, on its face, involves a local sex crime, where a “pimp” offered a teenager for sex, via local cell phone conversation and texts, and walked her a few blocks down the street, where the sex activity took place, and a small amount of cash was exchanged. There was no real actual effect on or involvement of interstate commerce in this incident in any reasonable view of what took place in this case. This was purely local activity.

The court’s jurisprudence in this area requires proof of an actual effect on interstate commerce for criminal cases such as this, where the statutory interstate commerce hook is that the crime occur “in or effecting” interstate commerce. Federal criminal jurisdiction in sex trafficking cases, (similar to many other federal criminal statutes, such as the Hobbs Act and Money Laundering statutes), is derived from Congress’s power to regulate interstate commerce under Article I, Section 8 of the U.S. Constitution. This Court has recognized, however, that the Constitution does not give Congress unrestricted power to regulate things commercial in nature: “[T]he scope of this power must be considered in the light of our dual system of government

and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local.” *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). This Court has identified three categories of activities that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce themselves, and; (3) activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

Congress’s authority to regulate the third category, activities substantially affecting interstate commerce, has been sporadically explored in recent years. The Court, in *United States v. Lopez*, , 514 U.S. 549 (1995), found the Gun-Free School Zones Act of 1990 to be an unconstitutional exercise of congressional authority to regulate interstate commerce. 514 U.S. at 551. *Lopez* declared that, “consistent with the great weight of our case law, the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.” *Id.* at 559. Under this test, the regulation failed, since the simple possession of a gun within a school zone is not an activity that “substantially affects” interstate commerce. *Id.* at 567.

The Court noted that the Act was a “criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.* at 561. Furthermore, the Court noted that the Act had no express jurisdictional element that “might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on

interstate commerce.” *Id.* at 562. Importantly, the Court refused to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.” *Id.* at 567.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Court further developed the analysis set forth in *Lopez*. The Court established the controlling test for this body of law, enumerating four questions to be answered in order to determine whether an activity substantially affects interstate commerce: (1) whether the activity in question [is] some sort of economic endeavor; (2) whether the statute contains an express jurisdictional element [that] might limit [the statute’s reach] to activities that have an explicit connection with or effect on interstate commerce; (3) whether the statute or its legislative history contains “express congressional findings regarding the effects [of the regulated activity] upon interstate commerce;” and, (4) whether the “link between [the regulated activity] and a substantial effect on interstate commerce was attenuated.” 529 U.S. at 610-13. The court has also stressed the importance of distinguishing between local activities and those that have a true impact on interstate commerce. It is imperative to keep in mind that “[a]ctivities local in their immediacy do not become interstate and national because of distant repercussions. To find immediacy or directness here is to find it almost everywhere.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935) (Cardozo, J., concurring).

Under the traditional Commerce Clause analysis articulated in *Lopez* and *Morrison*, the government was required to prove an “actual effect” on interstate commerce in this case, and Mr. Koech was entitled to a clear, concise and unambiguous jury instruction in order to fully embrace this important concept of constitutional law.² Instead, the court’s instructions, approved by the Eighth Circuit opinion, watered down this simple core concept, effectively reducing the “actual effect” requirement to a nullity. This core constitutional principle limiting federal criminal jurisdiction, an essential element of the offense, does not merit “de minimis” treatment; nothing short of a straightforward instruction to the jury requiring that the government prove an “actual effect” on interstate commerce was required to embrace and convey the constitutional issue at stake here. Failure to provide that instruction was error, and not harmless, as it was critical to the defense and involved an essential element of the offense.

Moreover, the sex trafficking act, unlike many other criminal statutes, does not rely on congressional findings for federal criminal jurisdiction, *cf. Gonzalez v. Raich*, 545 U.S. 1 (2005), nor is it an “instrumentalities” or “channels” statute that relies on the use of “channels” or “instrumentalities” of commerce for its interstate

² The Eighth Circuit agreed that the government was required to prove an “actual effect”: “We can agree with Koech that Congress’s use of “affecting” in § 1591(a)(1), like the use of “affects” in the Hobbs Act, 18 U.S.C. § 1951(a), and in the money laundering statute, 18 U.S.C. § 1956(c)(4), “suggests that there must be evidence of an actual rather than potential effect on interstate commerce.” *United States v. Williams*, 308 F.3d 833, 838 (8th Cir. 2002) (18 U.S.C. § 1951(a)); *see United States v. Evans*, 272 F.3d 1069, 1081 (8th Cir. 2001). However, the court disagreed that the instructions failed to convey this concept, even though the instructions neglected to include an “actual effects” instruction. (App. pp. 9-10.)

commerce jurisdictional hook. The sex trafficking statute leaves federal jurisdiction finding to case-by-case application to the jury, and thus requires an “actual effect” on interstate commerce, consistent with this court’s jurisprudence in this complex area. Accordingly, the sex trafficking statute, similar to both the Hobbs Act and Money Laundering statutes, relies on jury findings of jurisdiction as an element of the offense. As such, clear and unambiguous instructions are necessary to give this important element its proper due, and properly convey the constitutional limitation on the federal government’s exercise of its limited powers.

In addition, the government failed to prove an “actual effect” on interstate commerce because mere use of a cell phone to make local calls and texts in this case did not have an “actual effect” on interstate commerce, this was a purely local crime.³ There have to be limits on federal criminal jurisdiction for cases prosecuted which arise under the interstate commerce clause or the federal government’s power becomes limitless.⁴ If the mere use of a cellphone somewhere in the course of events

³ The Eighth Circuit improperly cited to evidence relating only to co-defendant Mathis and the conspiracy charge in its review and discussion of the sufficiency of the evidence concerning Mr. Koech’s single substantive count of sex trafficking, which charged Koech alone. (App. pp. 10-11). Mr. Koech was not in any way involved in traveling across state lines to obtain drugs or using the internet to solicit sex; that evidence related to his co-defendant alone and had nothing to do with Mr. Koech or his single substantive count, which did not involve interstate travel or use of the internet.

⁴ Moreover, the government’s expansion of federal criminal jurisdiction into local criminal behavior is at odds with this court’s contrary trend in civil cases, where the Court has increasingly set limits on Congressional power to regulate local behavior that does not actually affect interstate commerce. *Cf. N.F.I.B. v. Sebelius*, 567 U.S. 519 (2012).

is enough to confer federal jurisdiction, then there are no meaningful limits on federal criminal jurisdiction, because cell phones are ubiquitous. They are involved in everything and everywhere, and there are virtually no events, happenstances, or occurrences that do not in some fashion involve the use of a cellphone in today's world. That line of cases stating that use of a telephone is enough to convey federal jurisdiction is outdated by the technological advance and ubiquitous use of cell phones, which are much different devices than traditional telephones. If cell phone use alone is enough to convey federal jurisdiction, then there are no real limits on federal criminal jurisdiction. Accordingly, juries must be properly instructed that the offense requires proof of an "actual effect" on interstate commerce if the interstate commerce requirement is to have any meaningful limitation on federal criminal jurisdiction, otherwise it becomes a nullity, as evidenced by what happened in this particular case.

B. This case presents an apt vehicle by which to review the question

This case is an appropriate vehicle by which to review the limits of federal criminal jurisdiction under the interstate commerce clause. These issues – appropriate jury instructions and sufficiency of the evidence – can only arise following a jury trial and conviction. These are important issues which arise over and over again in countless jury trials which take place throughout the country, as well as have an impact on federal charging decisions because the issues relate to the outer boundaries of the exercise of federal authority to prosecute local criminal activities. Indeed, these issues only arise in the rare case in which a federal prosecutor charges out a federal criminal sex trafficking offense involving a mere

customer who did not travel across state lines or use the internet, and the activity was so local in nature that lack of interstate commerce involvement would be raised as a defense, and the issues are thus preserved for appellate and Supreme Court review. Accordingly, this case is an appropriate vehicle for the court to consider these important issues which impact the reach of federal criminal jurisdiction under the interstate commerce clause.

CONCLUSION

This case raises important issues bearing on the reach of the federal government's power to prosecute local criminal activity under the interstate commerce clause. Proof of actual effects on interstate commerce must be required to be consistent with this court's jurisprudence in this area, and unambiguous jury instructions requiring that the government prove an actual effect on interstate commerce are necessary in order to convey this important limiting principle on the reach of federal power. Accordingly, this court should grant this petition to resolve this important constitutional issue.

Dated: August 23, 2021

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