

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

JAPHER RAJAB

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether 18 U.S.C. § 2422 (b) authorizes a conviction based on an imaginary, non-existent victim.

II. Whether a defendant can be convicted under 18 U.S.C. § 2422 (b) on the basis of inconsistent ages of a single non-existent victim given by law enforcement, on age being under the age of 18 years and the other age being over the age of 18 years.

PARTIES TO THE PROCEEDING

Petitioner is Japher Rajab, the defendant-appellant below.

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

TABLE OF CONTENTS

Question Presented	i
Parties to the Proceeding.....	ii
Table of Authorities	v
Petition for Writ of Certiorari	1
Opinion Below	2
Jurisdiction.....	2
Statutes Involved.....	2
Statement of the Case	3
Reasons for Granting the Petition.....	4
I. 18 U.S.C. § 2422 (b) does not authorize the conviction of Japher Rajab based on an imaginary, non-existent victim	4
II. Japher Rajab could not be convicted under 18 U.S.C. § 2422 (b) because of inconsistent ages attributed by law enforcement to the non- existent, imaginary victim makes it impossible to determine what Rajab thought her real age to be.....	6
Conclusion	7
Appendix	
App. A. Decision and Judgment of the United States Court of Appeals for the Eighth Circuit (<i>United States v. Rajab</i> , 23 F.4th 793 (8 th Cir. 2022)	1a
App.B. Redacted Indictment, <i>United States v. Rajab</i> , 19-CR-50109,	

	Docket 14, filed August 14, 2019.	7a
App. C.	Trial Transcript (TT) 43; Gov't Exhibit 1	9a
App. D.	Trial Transcript (TT) 41, 87, 89	14a

TABLE OF AUTHORITIES

<u>Supreme Court Cases</u>	<u>Page(s)</u>
<i>Opper v. United States</i> , 348 U.S. 84 (1954)	6
<i>Smith v. United States</i> , 348 U.S. 147 (1954)	6
<i>United States v. Abdullahi</i> , 520 F3d 890 (8 th Cir. 2008)	4
<i>United States v. Ciesiolka</i> , 614 F3d 347 (7 th Cir. 2010)	7, 8
<i>United States v. Farmer</i> , 251 F3d 510 (5 th Cir. 2000)	7
<i>United States v. Hagen</i> , 139 F3d 641 (8 th Cir. 1998)	4
<i>United States v. Helder</i> , 452 F3d 751 (8 th Cir. 2006)	5, 7
<i>United States v. Pansil</i> , 338 F3d 1299 (11 th Cir. 2003)	6, 7
<i>United States v. Spurlock</i> , 495 F3d 1011 (8 th Cir. 2007)	5
<i>United States v. Wolff</i> , 796 F3d 972 (8 th Cir. 2015)	5
<i>Wong v. United States</i> , 371 U.S. 471 (1963)	6
<u>Statutes</u>	<u>Page(s)</u>
18 USC § 1254 (a)	2
18 USC § 2242 (b)	2, 4, 5, 6, 8
<u>United States Constitution</u>	<u>Page(s)</u>
Amendment 5	2
Amendment 6	2

<u>Other</u>	Page(s)
Antonin Scalia & Bryan A. Garner, Reading Law; <i>The Interpretation of Legal Texts</i> , 56-349 (Thompson West 2012)	5
David A. Moran, <i>In Defense of the Corpus Delicti Rule</i> , 64 Ohio St. L.J., 817, 819 (2003)	5

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rajab Japher, 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 23 F4th 793, was issued on January 14, 2022, and is reprinted in Appendix A to this Petition (“App.A”) at 1a-6a.

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 January 14, 2022. 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...

STATEMENT OF THE CASE

Petitioner was indicted for and convicted of one count of attempted enticement of a minor using the internet in violation of 18 USC § 2242 (b) by using a facility and means of interstate commerce, namely a cellular phone and computer attached to the internet and a phone connected to a cellular network, to attempt to

knowingly persuade, induce, entice, and coerce an individual who had not yet attained the age of 18 years of age to engage in sexual activity for which he could be charged with criminal offenses under the laws of South Dakota. The indictment is attached as Appendix B. Petitioner was sentenced to the required mandatory minimum sentence of 10 years in prison.

As set forth in the January 14, 2022, opinion of the 8th Circuit Court of Appeals at page two affirming the conviction “(e)vidence at trial showed that Rajab used a messaging software application called MeetMe to communicate with a purported (fictional, non-existent) minor named ‘Lucy.’ Lucy’s profile on the MeetMe application, however, was operated by a special agent of the Department of Homeland Security who played the role of Lucy. Lucy’s profile said that she was nineteen years old, but in messages to Rajab, she informed Rajab that she was actually fifteen years old. Emphasis added. Rajab responded, ‘your age is not a problem.’ In later messages, Rajab expressed doubt that Lucy was actually fifteen years old, but Lucy reiterated that she was indeed fifteen years old.”

The posted profile stated Lucy was 19 years old. Trial transcript (TT) 43-44; Gov’t. Exhibit 1. Attached as Appendix C. When an interested person responded as Rajab in this case, an online chat occurred and the undercover agent then switched the age of the person to someone under the age of 16. Trial transcript (TT) 41. Attached as Appendix D. Twice Rajab asked to speak to Lucy on the phone but was denied. *Id.* 87. And he did not want a picture of Lucy with a fork but wanted to observe her in person by phone video to see for himself that she was 19, but was

denied by the agent posing as Lucy. *Id.* 89.

REASONS FOR GRANTING THE PETITION

I. 18 U.S.C. § 2422 (b) DOES NOT AUTHORIZE THE CONVICTION OF JAPHER RAJAB BASED ON AN IMAGINARY, NON-EXISTENT VICTIM.

The interpretation of a statute and sufficiency of an indictment are reviewed de novo. *United States v. Hagan*, 139 F3d 641, 651 (8th Cir. 1998). Issues not raised in the district court are reviewed for plain error. *United States v. Abdullahi*, 520 F3d 890, 896 (8th Cir. 2008).

18 USC § 2242 (b), the statute under which Rajab was indicted, reads “(w)hoever, using the mail or any facility or means of interstate or foreign commerce ... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or 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 and imprisoned not less than 10 years or life.”

The statute and indictment refers to an individual who has not attained the age of 18 years. The phrase “individual who has not attained the age of 18 years” is plain and clear. Nowhere in this statute does it state that no actual victim under the age of 18 is required to sustain a conviction or that any adult person could deceptively pass him or her self off as someone who is under the age of 18 as an imaginary victim. Moreover, there is nothing on the face of this statute that says the only action required is the taking of a substantial step toward persuading or enticing an underage female into engaging in sexual activity. There is nothing in

the statute that suggests that sexual activity does not have to be actually proven to sustain a conviction.

The interpretation given to this statute by the Eighth and other Circuits in such cases as, for example, *United States v. Helder*, 452 F3d 751, 755 (8th Cir. 2006), *United States v. Spurlock*, 495 F3d 1011, 1013 (8th Cir. 2007), *United States v. Wolff*, 796 F3d 972, 973 (8th Cir. 2015), and others is contrary to the text of the statute, its intent, and meaning. The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means. *See Reading Law: The Interpretation of Legal Texts*, Scalia and Garner, at 56. Words are to be understood in their ordinary, everyday meanings. *Id.* 69. Nothing is to be added to what the text states or reasonably implies, that is, a matter not covered is to be treated as not covered. *Id.* 93. General terms are to be given their general meaning. *Id.* 101. An ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor. *Id.* 296. When a situation is not covered by a statute, a court should not reconstruct what the legislature would have done had it confronted the issue. *Id.* 349. The interpretation of this statute by this and other Circuits is not supported by its words. The statute does not allow an imaginary victim or the conviction of a defendant for anything less than sexual activity.

Aside from petitioner's conviction not being supported the language of 18 USC § 2242 (b), the conviction runs afoul of the common law corpus delicti rule which many commentators still espouse. David A. Moran, *In Defense of the Corpus*

Delicti Rule, 64 Ohio St. L.J., 817, 819 (2003) (explaining that the DNA exonerations “have confirmed that juries all too frequently convict the innocent based entirely on uncorroborated and unreliable confessions.”) The corpus delicti rule dictated that a defendant could not be convicted on the basis of an extra judicial confession alone, but rather the elements of the crime established by the confession had to be independently corroborated. *See Wong Sun v. United States*, 371 U.S. 471, 488-489 (1963)(“It is settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused.”); *Smith v. United States*, 348 U.S. 147, 152 (1954) (holding that an accused could not be convicted solely on an uncorroborated confession); *Opper v. United States*, 348 U.S. 84, 89 (1954) (holding that admissible, voluntary inculpatory statements required corroboration as to all elements of the offense as a matter of sufficiency of evidence). Without an actual victim that a defendant can observe and interact with, there is insufficient evidence for any conviction under § 2242 (b).

II. RAPHER RAJAB COULD NOT BE CONVICTED UNDER 18 U.S.C. 2422 (b) BECAUSE OF INCONSISTENT AGES ATTRIBUTED BY LAW ENFORCEMENT TO THE NON-EXISTENT, IMAGINARY VICTIM MAKES IT IMPOSSIBLE TO DETERMINE WHAT RAJAB THOUGHT HER REAL AGE TO BE.

18 USC § 2422 (b) requires the government prove a knowing persuasion, inducement, enticement, or coercion of a female under the age of 18 years to

engage in sexual activity. The statute contains a scienter elements, *United States v. Pansil*, 338 F3d 1299, 1301 (11th Cir. 2003), requiring the government to prove a specific intent to engage in the prohibited activity. *United States v. Ciesiolka*, 614 F3d 347, 356 (7th Cir. 2010). Under *United States v. Helder*, 452 F3d 751, 755 (8th Cir. 2006), an attempt conviction requires proof that a defendant believed that the female was a minor. See also *United States v. Farmer*, 251 F3d 510, 513 (5th Cir. 2000) (substantial step required).

As stated previously in this petition, the posted profile of the non-existent victim stated her age to be 19 years old. When Rajab responded, an online chat occurred between him and the agent posing as the victim wherein the agent switched the age of the non-existent victim to someone under the age of 16. Twice Rajab asked to speak to the non-existent victim on the phone so that he could confirm that she was 19 years old but was denied by the agent. Rajab did not want to rely upon a picture of the non-existent victim but wanted to observe her in person by phone video to see for himself that the non-existent victim was 19 years old, but was denied by the agent posing as Lucy. The conflict between the age of 19 in the ad and the conflicting age of 15 in the chats makes it impossible to reach the conclusion that Rajab knew the fictitious female to be under the age of 18 years.

United States v. Ciesiolka, 614 F3d 347 (7th Cir. 2010), reversed a conviction where agents provided different ages, one being an age of legal adulthood and other making the victim a minor.

CONCLUSION

The Court should determine whether federal courts can sustain convictions under 18 U.S.C. § 2422 (b) where the purported victim is non-existent and fictitious. Additionally, the decision in *Ciesiolka* conflicts with the decision of the Eighth Circuit in the present case approving law enforcement agents giving different ages one being an age of legal adulthood and another making the victim a minor. The Court should accept the petition in this case and hold that agents cannot give conflicting ages resulting in uncertainty on the part of any defendant as to the age of the victim making it impossible to reach the conclusion that a defendant knew the victim was under the age of 18 years.

Dated March 7, 2022.

Respectfully submitted,

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