No. 21-7624

IN THE SUPREME COURT OF THE UNITED STATES

WILFREDO LEE LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to plain-error relief from his conviction for attempting to entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b), on the theory that he was enticing a 13-year-old to engage in sexual activity on a military base, rather than in the surrounding Territory of Guam.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-78) is reported at 4 F.4th 706.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2021. A petition for rehearing was denied on December 14, 2021 (Pet. App. 79). On March 7, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including April 13, 2022. The petition for a writ of certiorari was filed on April 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Guam, petitioner was convicted of attempting to entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b), and transferring obscenity to a minor, in violation of 18 U.S.C. 1470. Pet. App. 80. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Id. at 81-82. The court of appeals affirmed. Id. at 1-78.

1. Petitioner was a member of the United States Army stationed at Andersen Air Force Base, located in Guam, who worked on-base and lived off-base. Pet. App. 6. In November 2017, petitioner responded to an advertisement in the "Casual Encounters, Women for Men" section of Guam's Craigslist website. Presentence Investigation Report (PSR) ¶¶ 12-13, 16; see Pet. App. 6. The advertisement, posted by an agent with the United States Air Force Office of Special Investigations, purported to be from "Brit," a 13-year-old seeking friends among "other mil brats" living on the base. Pet. App. 6.

Using an alias, petitioner invited "Brit" to "chill by the lookout on base" and "do whatever if you know what I mean." Pet. App. 6. When "Brit" replied that she was 13 years old, petitioner responded, "I'm 29, I can get in trouble for this." Ibid. Nevertheless, petitioner continued to communicate with "Brit,"

sending e-mails in which he repeatedly asked "Brit" to do "naughty things" and offered to "teach [her] how to kiss, have sex, suck a dick." Ibid. (brackets in original). Petitioner also sent "Brit" photographs and a video of his erect penis, and he asked "Brit" to send him nude photographs. Ibid.

Petitioner asked to meet "Brit" on four separate occasions at different locations within Andersen Air Force Base. Pet. App. 6. His first two proposed locations were the Base Exchange and an on-base Burger King; neither of those meetings materialized. Id. at 6-7. On the third occasion, petitioner proposed meeting "Brit" at the on-base library; petitioner appeared at the library and waited for some time before leaving. Id. at 7. On the fourth and final occasion, petitioner arranged to meet "Brit" at her purported on-base residence; when he arrived at the agreed-upon location, law enforcement officers arrested him. Ibid.

2. A grand jury in the District of Guam returned an indictment that charged petitioner with attempting to entice a minor to engage in "sexual activity for which any person can be charged with a criminal offense," in violation of 18 U.S.C. 2422(b), and transferring obscenity to a minor, in violation of 18 U.S.C. 1470. See Pet. App. 87-88. The Section 2422(b) count in the indictment alleged in part that petitioner had attempted to entice a minor "to engage in sexual activity for which a person can be charged with a criminal offense, to wit: First Degree

Criminal Sexual Conduct, in violation of 9 [Guam Code Ann.] § 25.15(a)(1)." Pet. App. 87-88. That Guam statute provides that a person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with a minor who is under 14 years old. 9 Guam Code Ann. § 25.15(a)(1) (2013). Guam law further provides that an attempt to commit that offense is a crime of the same grade and degree. Id. § 13.60(a) (2005); see id. § 13.10 (defining attempt). And federal law itself criminalizes, in 18 U.S.C. 2243(a), the knowing commission of a sexual act with a minor between the ages of 12 and 16 by a person at least four years older than the victim.

Petitioner proceeded to trial. At the close of the government's evidence, he moved for a judgment of acquittal based solely based on the theory that no reasonable jury could find that he believed "Brit" was a minor. Pet. App. 9. The district court denied the motion. Ibid. At the close of all evidence, petitioner renewed his motion for a judgment of acquittal on the same basis, and the district court again denied the motion. Ibid.

The district court instructed the jury using "a written script" to which both parties had agreed. Pet. App. 9. As relevant here, the court instructed the jury that the Section 2422(b) count required the government to prove that petitioner had attempted to entice a minor "to engage in sexual activity for which a person can be charged with a criminal offense, to wit, first degree

criminal sexual conduct in violation of 9 Guam Code Annotated Section 25.15(a)(1)." D. Ct. Doc. 95, at 16 (June 11, 2019). The jury found petitioner guilty on the attempted-enticement count and the obscenity count, and the court sentenced him to 120 months of imprisonment, to be followed by three years of supervised release. Pet. App. 9.

3. The court of appeals affirmed. Pet. App. 1-78. On appeal, petitioner argued for the first time that the evidence supporting his Section 2422(b) conviction was insufficient on the theory that he had attempted to entice "Brit" to engage in sexual activity on Andersen Air Force Base, a federal enclave where Guam would lack jurisdiction to prosecute him for a sexual-penetration crime. Id. at 19-20. The court found that plain-error review applied to petitioner's new argument because he had failed to raise that argument in the district court, id. at 20, and declined to set aside the judgment, see id. at 20-41.

The court of appeals reasoned that petitioner was not entitled to plain-error relief because he misunderstood what Section 2422(b) required the government to prove. See Pet. App. 21-29. Based on the statutory text and context, the court determined that "Section 2422(b) requires proof that the defendant's persuasive communications described sexual conduct that could be charged in at least one relevant territorial jurisdiction but does not require the Government to indict a specific predicate offense or to prove

a governmental entity would have had jurisdiction to prosecute the defendant for such predicate offense." Id. at 22; see id. at 22-25. And the court found the trial evidence sufficient to establish that petitioner attempted to entice a minor to engage in sexual activity that would constitute a criminal offense. Id. at 30-41.

The court of appeals observed that petitioner had intentionally communicated with "Brit" from within the Territory of Guam in furtherance of his goal of engaging in sexual penetration with a person whom he believed to be a minor. Pet. App. 31. The court reasoned that petitioner's communications with "Brit" constituted substantial steps toward the completion of a crime, that a rational jury could find that petitioner sent some of those communications from off-base locations in Guam (including his home), and that Guam could have prosecuted petitioner for attempting to engage in sexual penetration of a minor based on substantial steps taken within Guam, in violation of Guam law. Id. at 31-32. The court also found that any discrepancy between the indictment and the government's proof at trial constituted "at most" a nonprejudicial variance in proof, id. at 40, observing that that the trial evidence had proved "the same criminal behavior alleged in the indictment," id. at 38; see id. at 40.

Judge Bennett dissented from the court of appeals' affirmance of petitioner's Section 2422(b) conviction. Pet. App. 48-78. While Judge Bennett "neither assume[d] nor assert[ed] that Section

2422(b) requires the government to charge a particular predicate," id. at 52 n.6, he took the view that the court of appeals had constructively amended the indictment by affirming based on "a predicate offense not charged in the indictment," id. at 68; see id. at 60-68.

ARGUMENT

Petitioner contends (Pet. 11-36) that he is entitled to plain-error relief from his conviction for attempting to entice a minor to engage in unlawful sexual activity, in violation of 18 U.S.C. 2422(b), on the theory that he attempted to entice a 13-year-old to engage in sexual activity on a military base, rather than in the surrounding Territory of Guam. The court of appeals correctly rejected that contention, and its denial of plain-error relief does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Section 2422(b) makes it a crime to "knowingly persuade[], induce[], entice[], or coerce[] 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 attempt[] to do so," through the mail or a means of interstate or foreign commerce. 18 U.S.C. 2422(b). Petitioner challenges his attempt conviction under that statute on the theory that the hypothetical violation of a "specific predicate offense" is an implicit element of Section 2422(b) that the government must

charge and prove, rather than simply a "means" of committing the statute's final element ("sexual activity for which any person can be charged with a criminal offense"). Pet. 17-22.

In petitioner's case, however, the indictment did name a specific predicate "criminal offense": first-degree criminal sexual conduct, in violation of 9 Guam Code Ann. § 25.15(a)(1) (2013). Pet. App. 87-88. And the district court's instructions required the jury to unanimously find that petitioner had proposed sexual activity for which a person could be charged with that specific Guam offense. D. Ct. Doc. 95, at 16; Pet. App. 54 n.11 (Bennett, J., dissenting in part). This Court's resolution of the first question presented in the petition would therefore have no bearing on the correctness of the indictment and jury instructions in petitioner's case.

Petitioner's claim of error in the indictment and jury instructions is therefore not properly understood as a claim about whether a specific predicate offense is a means or an element of Section 2422(b). It is instead, at bottom, a claim that the indictment was required to allege, and the jury was required to find, that the hypothetical sexual activity in petitioner's case would have occurred somewhere in Guam that was not Andersen Air Force Base. Notably, petitioner has acknowledged that the hypothetical sexual activity would have been "sexual activity for which any person can be charged with a criminal offense" even if

it had occurred on the base, because it would have violated federal law. 18 U.S.C. 2422(b); see Pet. App. 50 n.5 (Bennett, J., dissenting in part) (noting petitioner's acknowledgment that such sexual activity would have violated 18 U.S.C. 2243(a)). But petitioner nonetheless contends (Pet. 6-7) that his Section 2242(b) conviction cannot be sustained without proof that the hypothetical sexual activity, criminally chargeable either on-base or off-base, would have occurred off-base.

Because petitioner failed to raise such an argument in district court, any entitlement to relief would require him to demonstrate plain error, see Pet. App. 20; Fed. R. Crim. P. 52(b) -- which he cannot do. To demonstrate plain error, a defendant must show (1) an "error"; (2) that is "plain"; (3) that affected his "'substantial rights,'" meaning there is "'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (citation omitted). In addition, the appellate court must conclude "that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" Id. at 2096-2097 (citation omitted). Petitioner has not satisfied, and cannot satisfy, those requirements.

As a threshold matter, to the extent that petitioner's claim is premised on an assertion that the evidence was insufficient to permit a rational jury to find that the sexual activity would have

occurred off-base, that premise is incorrect. Petitioner worked at Andersen Air Force Base but "lived off-base in territory subject to both federal law and the laws of Guam." Pet. App. 6. And although the trial evidence indicated that petitioner "proposed to meet 'Brit' only at locations within" Andersen Air Force Base, including a base exchange, a Burger King, and a library, id. at 33 (emphasis added), see id. at 6-7, and although the government did not argue to the court of appeals that the sexual activity could have occurred elsewhere, the jury could reasonably infer from the trial evidence that petitioner sought to entice "Brit" to have sex with him at his off-base home, where Guam law would undisputedly apply.

For example, the evidence showed that petitioner told "Brit," in one of their early communications, that he could not "do anything bad to [her] especially on base," because he would get in "trouble." Pet. C.A. App. 106 (emphasis added). In addition, petitioner admitted during his trial testimony that, when he responded to a Craigslist posting by a woman who was offering massages only to people who lived "on base," he had asked the woman whether she would be willing to visit him "off base, because that's where [petitioner] live[d]." Pet. C.A. App. 240-241; see id. at 242; Pet. App. 31. After the woman confirmed that she would provide a massage off base, petitioner offered to pay her for sex. Pet. C.A. App. 241.

Based on that evidence, the jury could reasonably infer that petitioner sought to entice "Brit" to have sex with him at his off-base home -- even if he proposed meeting on on-base locations -- because his home was a private location where petitioner would be less likely to get in "trouble" for doing something "bad" to her. Pet. C.A. App. 106. And any disagreement on that case-specific factual point, see Pet. 6, would at a minimum fail to satisfy the plain-error requirement of "clear or obvious" error, Molina-Martinez v. United States, 578 U.S. 189, 194 (2016) (citing United States v. Olano, 507 U.S. 725, 734 (1993)).

More fundamentally, it is neither clear nor obvious that petitioner's conviction would in fact require proof -- or, by extension, an allegation in the indictment or a jury instruction -- about the location of hypothetical "sexual activity" that could have been charged as a crime in any location where it might have occurred. Such a requirement would enable a defendant to frustrate a Section 2422(b) prosecution for attempted enticement by eschewing a detailed plan for where he and the minor would engage in unlawful sexual activity. If, for example, petitioner here were planning simply to play it by ear about where to have sex with "Brit" after meeting her in person, it would be impossible for a jury to find beyond a reasonable doubt whether he would have had sex with her on-base or off-base. Similarly, a defendant who attempted to entice a minor to take a road trip with him for the

purpose of unlawful sexual activity might not have planned the precise State in which they might spend each evening.

Petitioner has not identified any court that would require a jury to distinguish between the possible jurisdictions in which sexual activity with a minor, chargeable as a crime in each jurisdiction, might ultimately have happened. Instead, petitioner's assertion of a conflict is based solely on decisions -- United States v. Mannava, 565 F.3d 412 (7th Cir. 2009), and Richardson v. United States, 526 U.S. 813 (1999) -- that he views as supporting the proposition that a Section 2422(b) charge requires pleading and proof of a single specific crime that the enticed sexual activity would have constituted. See Pet. 13-15, 18-20.

But as discussed above, see p. 8, supra, the indictment here did allege, and the jurors in petitioner's case did unanimously find, that petitioner's planned sexual activity with "Brit" would have constituted a specific crime. The error here, if any, was instead the absence of an allegation or instruction regarding the jurisdictional circumstances of sexual activity that would meet the substantive definition of a crime either on or off the base. None of the decisions cited by petitioner addresses that issue, let alone imposes a requirement to prove both the substantive and jurisdictional components of a specific predicate offense, and

none suggests that his claim about the elements of Section 2422(b) warrants this Court's review.

2. Petitioner's additional claim that this Court should review the decision below on the theory that the court of appeals constructively amended the indictment (Pet. 25-36) is likewise misplaced.

This Court has found that a violation of the Grand Jury Clause of the Fifth Amendment may occur when an indictment specifies particular facts underlying an element of a charged offense, the government proves different facts at trial to establish that element, and the jury may have found guilt on that distinct basis. See, e.g., Stirone v. United States, 361 U.S. 212, 219 (1960). But petitioner neither tries to show, nor could he show, a constructive amendment in the district court proceedings, where the jury instructions -- including the instruction referring to a Guam crime -- matched the allegations in the indictment.

Petitioner cites no authority for his contention that a court of appeals can constructively amend an indictment by denying a sufficiency-of-the-evidence claim. And the purportedly conflicting decisions cited by petitioner (Pet. 30-32) all involve claims of a constructive amendment at a trial. They thus provide no basis for this Court's review of petitioner's novel constructive-amendment claim, and no such review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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