No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

OMAR KASHAKA TAYLOR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an overly broad interpretation of an ambiguous term in a criminal statute carrying severe penalties complies with established principles of statutory interpretation and due process?

2) Whether a jury instruction effectively directing a conclusion on a disputed element of the charged offense denies a defendant due process?

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Petitioner Omar Kashaka Taylor respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, August 10, 2022.

OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit that is the subject of this petition is reported in *United States v. Taylor*, 44 F.4th 779 (8th Cir. 2022), and is reprinted in the appendix hereto, p. 1A-28A, infra. The Eighth Circuit denied a petition for rehearing en banc or panel rehearing in an order filed on October 20, 2022. (Appendix 29A).

The final judgment of the United States District Court for the District of Minnesota and rulings (Senior District Judge Donovan W. Frank) that are the subject of this Petition have not been reported. The documents deemed relevant to this Petition are reprinted in the Appendix.

JURISDICTION

Petitioner Omar Kashaka Taylor was convicted in a jury trial of sex trafficking a minor, and two counts of sex trafficking by force, fraud and coercion in violation of 18 U.S.C. § 1591, and and committing a felony offense involving a minor while required to register as a sex offender in violation of 18 U.S.C. § 2260A. Mr. Taylor was sentenced to 400 months imprisonment by the Judge Donovan W. Frank, Senior United States District Judge for the District of Minnesota. Sentence was imposed on August 7, 2020 and final judgment was entered on August 18, 2020. Mr. Taylor timely appealed his conviction and sentence.

The United States Court of Appeals for the Eighth Circuit affirmed Mr. Taylor's conviction and sentence August 10, 2022 , and denied his petition for rehearing en banc or panel rehearing on October 20, 2022. Mr. Taylor now timely files this petition for writ of certiorari.

The jurisdiction of this Court to review the judgments of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amendment V - No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Omar Taylor operated a massage business in rented house in northeast Minneapolis. (Appendix 2A). From approximately the fall of 2016 until March 2018, Mr. Taylor allowed numerous women to use some of the bedrooms and the basement to conduct massages for paying customers. (Trial Tr. 64-66, 79-84, 111-116, 228-29, 532-546, 1008-1012, 1019-1043, 1065-1069). They paid monthly rent to Mr. Taylor or more often paid him a fixed fee, usually around $40, for each massage that they performed. (Id.)

The service advertised and provided was a massage, but there was testimony that customers also frequently expected and were provided with a "happy-ending" which encompassed the customer ejaculating. Although most testimony indicated that a happy-ending consisted of the masseuse masturbating the customer's genitals, one masseuse testified it meant the customer would "come in to jack off." (Trial Tr. 56:22-24). The masseuses testified that they arranged happy-endings on their own, and the $40 fee per massage that they paid to Mr. Taylor was not related to whether a happy-ending or any sexual related service was performed or how much the masseuse charged per session. (Trial Tr. 64-66, 84, 85-86, 106-107, 117-120, 123-124, 543-547). One masseuse

explained that the advertisements that she posted on the internet for her services stated "strictly massage" but she performed happy-endings. (Trial Tr. 106-107).

Mr. Taylor told women using space in his house that the service to be provided was strictly massage, and instructed them not to touch any client below the waist or allow any client to touch them, and that he would make them leave if they did sex acts. (Trial Tr. 274-275, 379, 535-536, 1069-70, 1087, 1103, 1112-1113). Government agents subpoenaed or obtained pursuant to search warrants numerous records from Mr. Taylor's internet and social media accounts where there was messaging and advertisements regarding massages, and alleged that phone numbers and email addresses were associated with Mr. Taylor. The government alleged that the content of some of the messages and advertisements suggested sexual activity or contained coded language relating to sexual activity.

Mr.Taylor denied when testifying on his own behalf, that he had in any way coerced, pressured, encourage or even permitted any women to engage in sexual acts while performing massages.

SN, the first victim in the Indictment, was a 17 year old from northern Minnesota who had been in a juvenile facility and in foster care, and was addicted to methamphetamine and heroin. She had corresponded with Taylor by text or on social media over time. When she moved to St. Paul to live with her grandparents, she made contact with Mr. Taylor for the purposes of obtaining drugs. SN alleges that Mr. Taylor

gave her alcohol, while providing contradictory and ambiguous statements and testimony that sometimes suggested she believed that Taylor sexually assaulted her.

SN testified that Taylor introduced her to the idea of doing massages in mid to late August, 2017. (Trial Tr. 375). Mr. Taylor told her there was nothing sexual about it and he would not have to do anything she did not want to. (Trial Tr. 379). She agreed because she needed money. (Trial Tr. 376). SN claimed that Taylor took pictures of her with limited clothes, and stated he would handle the texts and she would answer the phone calls. (Trial Tr. 377-78). She testified that customers brought up sex acts almost every time but she would refuse. (Trial Tr. 382-83). SN testified that she performed "handjobs" 3-4 times, but also testified that she refused handjobs and the customers would eventually stop asking. (Trial Tr. 383-84). She alleged that other customers touched her inappropriately. (Trial Tr. 383). SN also alleged that Taylor sexually assaulted on multiple occasions.

AL, when 18 years old, approached Mr. Taylor about performing massages because her friends who worked at the house stated they were legal and did not indicate there was anything sexual. (Trial Tr. 533-534, 568-569). According to AL, Taylor explained how to use the TextNow application, and stated that he would post advertisements on Backpage for her. (Trial. Tr. 536). AL never saw the ads posted for her. (Trial Tr. 540). The ads which she identified as hers at trial contained no mention of any sex acts. (Trial Tr. 541-542, Govt. Exhibits 37-38). AL arranged her own

appointments through TextNow. (Trial Tr. 540-41, 574). AL handle all interactions with customers. (Trial Tr. 572-73). She sometimes went to the Spring Street house just to "hang out" and not do massages. (Trial Tr. 554, 578).

AL complained in her testimony that she was uncomfortable because most customers wanted happy-endings, and sometimes would try to touch her. (Trial Tr. 548-549). When clients requested sexual acts in text messages, AL would decline and the appointment would not occur. (Trial Tr. 580-81). On one occasion, an aggressive customer was able to pressure AL to perform a "handjob." (Trial Tr. 559-560).

AL did not discuss with Mr. Taylor about clients asking for happy-endings. (Trial Tr. 549-550). When AL told Taylor about customers touching her, Taylor did not condone any such actions but told AL to put their hands back and that the service provided was just a massage. (Trial Tr. 549-550).

AL testified that Taylor paid her to massage him when she did not have a customer. (Trial Tr. 555). She complained that Mr. Taylor tried to touch her, and she moved his hand away to prevent him. (Trial Tr. 556). There is no allegation of an actual sexual act.

A jury trial was held from January 28 - February 1, and February 4-5, 2019. The charged offenses in Counts 1, 2 and 4 under 18 U.S.C. § 1591(a) encompass knowing actions that cause a victim to engage in a "commercial sex act." The prosecution's theory of the case was that Mr. Taylor arranged for SN, AL and other's to perform "happy-

ending" massages. The government specifically requested that the court define happy ending massages as a commercial sex act. (Trial Tr. 933). The district court instructed the jury that the district court instructed the jury that a sex act for purposes of the charged offense "includes happy-ending massages." (Trial Tr. 1352:16-17). The prosecution emphasized the instruction on happy-ending massages and relied on them as the basis for conviction in its closing arguments. (Trial Tr. 1259:7-8, 1263:8, 1273:14-15, 1282:12).

Taylor objected to the jury instruction defining commercial sex act at a happy ending massage. (Trial Tr. 942:9-12). Taylor unsuccessfully moved for a judgment of acquittal at the close of the government's case-in-chief and again at the close of the evidence, in part on the grounds that the government failed to prove a "commercial sex act." (Appendix 9A).

REASONS FOR ALLOWANCE OF THE WRIT

This case presents an opportunity for the Court to address the unsettled issue of how broadly to define "commercial sex act" 18 U.S.C. § 1591, including whether liability under this serious felony provision it encompasses mere touching in addition to sexual penetration. This case further provides a chance for the Court to place limits on jury instructions that employ language not used in the charged statute to effectively mandate a particular result.

1. The Court Should Make Clear that a "Commercial Sex Act" under the Sex Trafficking Statute Does not Encompass Sexual Contact that is not Clearly a Sex Act.

The charged offenses in three of the counts of the Indictment in this case under 18 U.S.C. § 1591(a) encompass knowing actions that cause a victim to engage in a "commercial sex act." The prosecution's theory of the case was that Mr. Taylor arranged for alleged victims SN, AL and others to perform "happy-ending" massages. The government specifically requested that the court define happy ending massages as a commercial sex act. The district court instructed the jury that the district court instructed the jury that a sex act for purposes of the charged offense "includes happy-ending massages." The prosecution emphasized the instruction on happy-ending massages and relied on them as the basis for conviction in its closing arguments.

A "happy-ending massage" is not a commercial sex act within the meaning of 18 U.S.C. § 1591. The statute's definition of "commercial sex act" is "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(e)(3). "Sex act" is not specifically defined under the statue. In order to ascertain the definition, it is most reasonable to look to another statutory provision where "sexual act" is specifically defined. For purposes of the sexual abuse statutes in Chapter 109A of the federal criminal code, "sexual act" is defined as follows:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
> (B) contact between the mouth and the penis, the mouth and the vulva, or

> the mouth and the anus;
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

18 U.S.C. § 2246(2). A "happy-ending" as described by witnesses in the trial of the instant case, does meet any of the definitions of a sexual act that are specifically set forth in this federal statute.

It is also instructive and insight inducing that the definition in § 2246 is for "sexual contact" which is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;" 18 U.S.C. § 2246(3). A "happy-ending" could meet the definition of "sexual contact." Although improper sexual contact can be a crime under several provisions 18 U.S.C. Ch. 109A, it is less serious than a sexual act. Given the harsh punishments for offenses under 18 U.S.C. § 1591, including mandatory minimum sentences of 10 to 15 years in prison and up to life, it is only reasonable to infer that Congress intended a "sex act" under the statute to be more intrusive that any sexual contact.

In its rejection of Mr. Taylor's position, the appellate panel emphasized Congress' use of the word "any" to modify "sex act" as evidence of the intent to apply an expansive

meaning, and relied on an unpublished opinion in the 9th Circuit and several district courts in other circuits that rejected arguments that sexual contacts of a lesser magnitude than sexual intercourse were not commercial sex acts. There is no record suggesting that Congress intended “any” sex act was intended to encompass acts that are no normally punishable by long prison terms applicable in the underlying statute. The non-binding decisions relied on help illustrate the weakness of the arguments in favor of a such an expansive interpretation of such a consequential term.

The unpublished opinion in United States v. Bazar, 747 F. App'x 454, 456 (9th Cir. 2018) rejected the argument that commercial sex act is limited to sexual intercourse for money, relying on non-legal dictionary definitions from the Oxford and Merriam-Webster Dictionaries which broadly consider sex acts to encompass anything involving "physical attraction or intimate physical contact" or any "act performed with another for gratification." Id.

There a at least a couple of problems with Bazar's approach. First its choice of common dictionary definitions is selective. Dictionary.Com defines sex act as "sexual intercourse; copulation." www.dictionary.com/browse/sex-act. Lexico's definition of sex act is "The act of sexual intercourse." www.lexico.com/en/definition/sex_act. Collins Dictionary defines sex act as "sexual intercourse; copulation." www.collinsdictionary.com/us/dictionary/english/sex-act. The Cambridge Dictionary does not specifically define sex act but defines sex as "the activity of sexual intercourse."

dictionary.cambridge.org/us/dictionary/english/sex. It is not at all clear that the natural, ordinary or common meaning of sex act is so broad as to encompass any conduct associated with sexual gratification rather than the commonly understood act of sexual intercourse, or at least sexual penetration. The appellated panel in the instant case did not address this problem in its written opinion.

The second problem with the approach of Bazar is that adapting a definition of a term in a criminal statute selectively plucked from randomly chosen lay dictionaries is not an appropriate or fair means of determining the meaning of a term or phrase where the consequence at stake is decades in prison. There are no reasonable grounds for concluding that Congress intended such a serious statute to be interpreted based on random perusals of a couple of dictionaries rather than a more reasoned interpretation based on logical policy considerations. Based on the broad definitions selected it is possible that a kiss or touch on a non-intimate area of the body, could also be construed as a "sex act" carrying a penalty of fifteen years to life in prison.

It is problematic for lower courts to choose to apply such a broad definition of a vague term that does not provide clear notice as to what sorts of acts that are on the margins may constitute a “commercial sex act” and thereby give rise to substantial criminal liability. As this Court has previously explained, “In our constitutional order, a vague law is no law at all.” United States v. Davis, 204 L. Ed. 2d 757, 139 S. Ct. 2319, 2323 (2019). Davis held that it was impermissible where a “statute threatens long prison

sentences for anyone who uses a firearm in connection with other federal crimes" but failed to clearly set forth "*which* other federal crimes." Id. It is as much a violation fo due process to threaten a long prison sentence for procuring a person to engage in a "commercial sex act" without defining what constitutes a "sex act."

This is a case that compels an application of the rule of lenity. "When there are two equally plausible interpretations of a criminal statute, the defendant is entitled to the benefit of the more lenient one. '[T]he tie must go to the defendant.'" United States v. Taylor, 640 F.3d 255, 259–60 (7th Cir. 2011)(citing United States v. Santos, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008); Bell v. United States, 349 U.S. 81, 83–84, 75 S.Ct. 620, 99 L.Ed. 905 (1955) (Frankfurter, J.). "This venerable rule [the 'rule of lenity,' as it is called] not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." Santos, supra, 553 U.S. at 514, 128 S.Ct. 2020. The panel made no attempt to reconcile the established and venerated rule of lenity with its expansive interpretation of sex act in the instant case. Given the differing possible interpretations of "sex act," justice compels a more restrictive definition when determining whether a person is criminally liable.

It important for the entire Court to settle the issue of what level of conduct is

required to violate the sex trafficking statute.

2. The Court Should Make Clear that a Jury Instruction Cannot Effectively Direct a Conclusion on a Disputed Element of the Charged Offense.

The Eighth Circuit concluded that it did not "condone" the district court's jury instruction that the element of a commercial sex act "includes happy-ending massages." (Appendix 16A), but held that any error was harmless beyond a reasonable doubt. This Court should use this case to set a clear standard that the definitions and elements provied in jury instructions must be limited to the statutory language rather than a prosecutor's or district court's interpretation of how the statutory language should be applied. Even if one accepts the legal conclusion that a happy ending massage is a commercial sex act, it was constitutional error to instruct the jury to arrive at such a factual conclusion that cannot be deemed harmless.

The appellage panel correctly cited binding precedent establishing that "A judge commits error when he instructs the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding." United States v. White Horse, 807 F.2d 1426, 1429 (8th Cir. 1986)(citing United States v. Voss, 787 F.2d 393, 398 (8th Cir.1986) (citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)). White Horse continues, "It makes no difference that the evidence supporting proof of that element is 'overwhelming' . . ., for it is the jury's role, not the judge's, to find the facts essential to a

criminal conviction. Id. (Citing Voss, 787 F.2d at 399 and United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977)).

The constitutional right to a jury trial for serious criminal offenses is both a fundamental individual right and a right "fundamental to the American scheme of justice." Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). A necessary aspect of the right to a jury trial is that every fact essential to the conviction of an individual must be proved beyond the jury's reasonable doubt. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (quoting Davis v. United States, 160 U.S. 469, 484, 493, 16 S.Ct. 353, 360, 40 L.Ed. 499 (1895)). Based on the Supreme Court's prior holdings, it is erroneous to dismiss the district court's erroneous jury instruction as to a fact essential to conviction as harmless error based on the panel's determination that the evidence that a sex act was committed was sufficient so that "a reasonable jury would have found Taylor guilty beyond a reasonable doubt" regardless of the instruction. " (Appendix 16A). Even if the Court viewed the evidence as overwhelming, its prior precedence makes it clear that the error made is of such a constitutional magnitude that it is nevertheless reversible.

Even if harmless error analysis were applied, this Court should make clear that it would not be appropriate in this case, and thereby provide limitations on the overly elastic concept of harmless error. Witness Mor Vang, one of the massage workers at the Spring Street house, testified that a happy ending massage was when the customer would "come

in to jack off." (Trial Tr. 56:22-24). This testimony indicates the customer would masturbate himself rather than the massage worker engaging in any sexual contact. If the jury were to credit this explanation of a happy-ending, there would not be any basis for the district court's instruction that a happy-ending was a sex act. The panel's decision impermissibly resolved contradictory testimony about the meaning of a "happy ending massage" to conclude that a jury would have automatically deemed such a massage to be a commercial sex act even if not directly instructed that it was a commercial sex act.

It is dangerous to Mr. Taylor's and other defendants' rights to a fair trial to so liberally apply the harmless error rule to ignore clearly harmful errors. As a prior Supreme Court opinion warned,

> Harmless-ercror analysis is not an excuse for overlooking error because the reviewing court is itself convinced of the defendant's guilt. The determination of guilt is for the jury to make, and the reviewing court is concerned solely with whether the error may have had a "substantial effect" upon that body.

United States v. Lane, 474 U.S. 438, 465 (1986)(Brennan concurring/dissenting in part). Numerous commentators have cautioned about the dangers of an appellate court invoking harmless error to undermine the constitutional rights associated with a trial. See e.g. Mitchell, Against Overwhelming" Appellate Activism: Constraining Harmless Error Review, 82 Cal. L.Rev. 1335, 1353 (1994)("Two primary reasons exist for the great respect given to trial courts' findings of fact. First, the trial court is in the best position to assess the probative value of evidence.... Second is a rationale specific to criminal trials:

if criminal juries are truly to sit as the 'final arbiter[s] of truth and justice,' their factual determinations must be given finality") and at 1353-55 ("rightly or wrongly, 'jury trials comprise the heart of our criminal justice system.' A defendant expects to receive judgment from a panel of peers and not from a panel of experienced jurists who may approach questions of guilt in a significantly different manner. Indeed, the defendant may seek to exploit the sympathies of jurors who have not become immune to the pleas of defendants or jaded by repeated encounters with hardened criminals. This right to invoke public sympathy and opinion is guaranteed by the Sixth Amendment.); R. Traynor, The Riddle of Harmless Error 80 (1970) ("[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex. Each evaluation bears upon our traditional understanding that fair trial encompasses not only fair notice and an adequate opportunity to be heard before the appropriate tribunal, but also an orderly presentation of evidence and a rational application of the law thereto"); Bilaisis, Harmless Error: Abettor of Courtroom Misconduct, 74 J. Crim. L.& Criminology. 457, 475 (1983) ("The harmless error standards as currently applied in review of criminal trials are eroding the integrity of the criminal justice system by encouraging violations of longstanding trial rules"); Goldberg, Harmless Error: Constitutional Sneak Thief, 71 J.Crim.L. & C. 421, 422 (1980) ("the doctrine of harmless constitutional error destroys important constitutional and institutional values"); Winslow, Harmful Use of Harmless Error in Criminal Cases, 64

Cornell L.Rev. 538, 540 (1979) ("increased use of harmless error analysis is inherently dangerous regardless of whether the errors violate the Constitution, statutes, or the common law"); Fairfax, Harmless Constitutional Error and the Institutional Significance of the Jury, 76 Fordham L. Rev. 2027, 2072 (2008) ("By usurping the jury's core fact-finding function through harmless error review of elemental omissions, appellate courts undermine the jury's structural and institutional role of injecting popular input into the judicial function. Notwithstanding the pragmatic benefits that might flow from allowing appellate judges to substitute their judgment of the facts for that of the jury, 'first-guessing' works a fundamental intrusion into the province of the jury."); Griffin, Criminal Adjudication, Error Correction, and Hindsight Blind Spots, 73 Washington and Lee L. Rev. 165 (Winter 2016)(discusses problems of applying harmless error analysis in light of psychological evidence of confirmation bias which obstructs decision makers due to the tendency to construe errors in favor of the known results); Winkelman, et al., An Empirical Method for Harmless Error, 46 Ariz. St. L.J. 1405 (Winter 2014)(Also analyzes problems of harmless error analysis in light of empirical evidences of biases inherent when the outcome is already known).

In the instant case, the panel opinion stretched harmless error analysis far beyond any legitimate justification by concluding that a jury instruction that clearly violated Mr. Taylor's constitutional rights to a jury trial and due process somehow did not make a difference in the verdict, even where there were disputed facts underlying the

determination at issue. This case presents an opportunity for the full Court to provide much needed clarification to the parameters of the harmless error doctrine.

CONCLUSION

Petitioner Omar Kashaka Taylor respectfully prays that a writ of certiorari issue.

Respectfully submitted,

Dated: January 17, 2023

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