No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANNY LOWE, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Danny Ray Lowe was convicted of attempting to sex traffic two fictional minors in an undercover sing. As the Court of Appeals acknowledged, "The critical issue at trial—the only real point of contention—was Mr. Lowe's intent." Despite the fact that the only issue presented to the jury concerned his criminal intent, the District Court erroneously instructed the jury that the mens rea is "knowledge" rather than "intent" and his counsel failed to object. Nevertheless, the Court of Appeals found the error to be harmless. Is it inconsistent with this Court's harmless error jurisprudence to find a jury instruction that misstates the mens rea of the offense harmless where the sole issue at trial is whether the defendant acted with criminal intent?

PARTIES TO THE PROCEEDINGS

Petitioner, the defendant-appellee below, is Danny Ray Lowe.

The Respondent, the appellant below, is the United States of America.

RELATED PARTIES AND PROCEEDINGS

United States v. Lowe, Alaska District Court, 17-133.

United States v. Lowe, Court of Appeals for the Ninth Circuit, 19-30039

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The petitioner, Danny Ray Lowe, petitions this Court for a writ of certiorari to review the final order of the Court of Appeals of the Ninth Circuit.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is unreported and reproduced at Petition Appendix. A-1 to A-3. The opinion affirmed the District Court of Alaska. The District Court opinion is reproduced at A-4 to A-10.

JURISDICTIONAL STATEMENT

The Court of Appeals entered judgment on October 25, 2023. A-1. This Court has jurisdiction over the timely filed petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Sixth Amendment – "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Section 1 – "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

18 U.S.C. §1591(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, cercion 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. §1594(a) – "Whoever attempts to violate section 1581, 1583, 1584, 1589, 1590 or 1591 shall be punishable in the same manner as a completed violation of that section."

18 U.S.C. §2422(b) – "Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States 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 for life."

INTRODUCTION

Under this Court's jurisprudence, an error in the jury instructions that misstates or omits an essential element of the offense can never be harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Danny Lowe was convicted by a jury of two counts each of attempted sexual trafficking of a minor and attempted sexual exploitation of a minor. He was arrested as part of a law enforcement sting operation with a police detective posing as a mother of two fictitious teens. Mr. Lowe testified at the trial and repeatedly asserted he never intended to have sex with the underage girls. As the Court of Appeals

acknowledged, "The critical issue at trial—the only real point of contention—was Mr. Lowe's intent."

The jury instructions required the jury to determine whether Mr. Lowe "knowingly attempted," rather than "intentionally," take a substantial step towards the completed crimes. As both the District Court and the Ninth Circuit acknowledged, criminal attempt requires a person act "intentionally" at the time of the offense. Jury instructions that require mere "knowledge" misstate the mens rea of the offense.

Nevertheless, neither the District Court nor the Court of Appeals afforded relief, reasoning that there was no possibility the erroneous wording could have affected the verdict. This conclusion is at odds with this Court's harmless error jurisprudence. This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

Danny Lowe was indicted for four criminal counts: two counts of attempted sexual trafficking in a minor in violation of 18 U.S.C. §1591 and two counts of attempted sexual exploitation of a minor in violation of 18 U.S.C. §2422. The investigation began on March 27, 2017 when

Detective Leonard Torres of the Anchorage Police Department, acting in an undercover capacity, posted an ad on Craig's List for "Women Seeking Men." The ad solicited people to engage with "little cousins just in town from Puerto Rico," who were "literally nymphos" and were "clean, petite and young." Mr. Lowe was one of approximately 50 people to respond to the ad. Detective Torres, using the alias "Maria," clarified the ad pertained to Crystal and Gabriella, two girls aged 13 and 14.

Over the next six months, Mr. Lowe and Detective Torres corresponded by text message about the proposed transaction. Over 200 text messages were exchanged. There were frequently long periods of silence, until one or the other of them would reinitiate contact. For instance, after initially texting with "Maria," on March 28, 2017, Mr. Lowe abruptly quit texting, which caused Detective Torres to reinitiate contact on April 3. On April 24, Mr. Lowe texted, "Don't father [sic], not interested in children." Later, he texted, "I'm interested in legal, old enough women, that likes to and can and will say yes." He also texted, "I'm interested in women that are basically old enough and willing. I'm not interested in children."

Mr. Lowe was eventually lured to a Motel 6 motel room on September 12, 2017 where he was arrested. As charged in the Indictment, the Government alleged he "knowingly attempted" to engage in a commercial sex act Crystal and Gabriella.

The case proceeded to jury trial. Mr. Lowe testified on his own behalf. Throughout his testimony, Mr. Lowe repeatedly asserted he never intended to have sex with Crystal and Gabriella – he was only interested in having sex with their mother.

- I – that's why I wanted a witness, to help explain to the cops that I wasn't intending on being with any kids, that – that he was there to witness that that's what went on.
- Q: Was it your intent ever, sir, to use these condoms to have sex with two minor children, sir? A: No, sir. Honestly, I didn't intend on using them at all, because I can't have sex at the moment.
- Q: Sir, at any time, was it ever your intent to have sex with two minor children? A: No, sir, it was not. That's why I stated earlier that I never intended on that. I intended on turning her in.

- Q: So were you trying to say, “I want to meet this working girl that's in the lobby tonight?” A: Yes, sir, that's exactly what I meant.
- Q: You say “women.” What do you mean by the word “women?” A: Women being old – old enough that – that's over the age of 18 and older, that maybe that they would like older men.
- Q: And when you say "back up your story", what do you mean by that, sir? A: That I wasn't interested in messing with any kids or having anything to do with that, anyone under the age of 18.
- Q: You're saying that in Exhibit 6, when you wrote "very sorry" what you were actually saying was, "I am very sorry that my undercover investigation has failed to save the children who are being forced – or who are being sold for sex"? That's what you actually meant? A: Yeah, I was very sorry for not helping saving them.

The Court’s jury instructions on all four charges required the jury to find the following facts, in relevant part: “(1) Between March 27, 2017 and September 12, 2017, the defendant knowingly attempted to . . . ; [and] (3) within the District of Alaska the defendant did something that

was a substantial step toward committing the crime and that strongly corroborated his intent to commit the crime." (Emphasis added.).

Defense counsel did not object to the jury instructions, which erroneously required the jury to find he acted "knowingly" rather "intentionally." In his Declaration, Mr. Lowe's trial counsel later stated the reason he did not object to the jury instructions was because he "believed that the jury instructions that were given at trial were appropriate and based on 9th Circuit applicable instructions."

The jury convicted Mr. Lowe as charged. On direct appeal, the Court of Appeals for the Ninth Circuit affirmed in large part, although it remanded for correction of a scrivener's error. Mr. Lowe did not petition for certiorari.

On February 9, 2022, Mr. Lowe filed a pro se petition to vacate the conviction pursuant to 28 U.S.C. §2255. In the petition, he raised a variety of issues, including multiple allegations of ineffective assistance of counsel. The District Court later appointed counsel.

The District Court denied the Petition but granted a certificate of appealability as to the mens rea issue. The Court of Appeals for the Ninth Circuit affirmed.

REASONS FOR GRANTING CERTIORARI

As the Court of Appeals for the Ninth Circuit conceded, the only issue presented to the jury was whether Mr. Lowe acted with criminal intent. As the Court succinctly put it, "The critical issue at trial—the only real point of contention—was Mr. Lowe's intent. Both sides pitched it to the jury that way." A-2.

Given that the critical issue at trial was Mr. Lowe's intent, it was incumbent on the District Court to instruct the jury that the proper mens rea is intent. The District Court erred by instructing instead that the mens rea is knowledge and trial court erred by failing to object. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The essential elements for criminal attempt are well-established. "A conviction for attempt requires the government to prove (1) culpable intent, and (2) conduct constituting a substantial step toward commission of the crime that is in pursuit of that intent. A substantial step consists of conduct that is strongly corroborative of the firmness of a defendant's criminal intent. Mere preparation does not constitute a substantial step." *United States v. Buffington*, 815 F2d 1292, 1301 (9th

Cir. 1987) (citations omitted) (finding insufficient evidence of intent to sustain conviction for attempted bank robbery). "The statutory language for the crime of attempted illegal reentry differs from the language used for an accomplished illegal reentry, because 'attempt' is a term that at common law requires proof that the defendant had the specific intent to commit the underlying crime and took some overt act that was a substantial step toward committing that crime." *United States v. Gracidas–Ulibarry*, 231 F.3d 1188, 1190 (9th Cir. 2000) (en banc).

It is black letter law that English common law recognized four mens reas: intent (or purpose), knowledge, reckless, and negligence. See Model Penal Code, §2.02. In differentiating between purpose and knowledge, this Court has said, "In a general sense, 'purpose' corresponds loosely with the common-law concept of specific intent, while 'knowledge' corresponds loosely with the concept of general intent." *United States v. Bailey,* 444 U.S. 394, 405, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). The distinction between specific intent and general intent is particularly important when the charged crime is "attempt," which requires the most heightened mens rea recognized in the law. "In certain narrow classes of crimes, however, heightened culpability has been thought to merit

special attention. . . [One] such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior." *Id.*

As both the District Court and Court of Appeals recognized, it was error for the District Court to instruct the jury that the requisite mens rea for criminal intent was "knowledge" rather than "intent." Neither Court afforded relief, however, essentially conducting a harmless error analysis. As the Ninth Circuit put it, "At least in the context of this case, the different wording made no difference. The instructions well presented the critical issue of Mr. Lowe's intent. Failing to object to wording that could not possibly affect the outcome is not deficient performance." A-3.

The Ninth Circuit's decision to treat the instructional error as harmless flies in the face of this Court's harmless error jurisprudence. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). In *Neder*, this Court emphasized that a missing or erroneous jury instruction defining the charged offense will rarely be harmless "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." *Neder* at 19. See *United States v. Price*, 980 F.3d 1211, 1250 (9th Cir. 2019) (Judge Collins, dissenting)

("Like any other sufficiency inquiry, that analysis requires the court to credit the defendant's testimony concerning the missing element, no matter how incredible we judges may find it (and I too, find Price's testimony to be incredible here).")

This Court further explained this principle in *Greer v. United States*, 593 U.S. __, 141 S.Ct. 2090, 210 L.Ed.2d 121 (2021). In *Greer*, two unrelated defendants sought to take advantage of this Court's decision in *Rehaif v. United States*, 588 U.S. __, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019) (holding that unlawful possession of a firearm requires proof the defendant knew they were ineligible to possess a firearm). Both defendants in *Greer* were convicted felons and, therefore, faced the "uphill climb" of showing he was unaware of his status as a felon. *Greer* at 2097. One defendant stipulated he was a felon in his jury trial and the other defendant admitted he was a felon in his guilty plea.

This Court concluded that neither defendant could show, but for the mistake as to the mens rea, the outcome would have been different. In reaching this conclusion, this Court cited *Neder* at length, saying, "By contrast, discrete defects in the criminal process—such as the omission of a single element from jury instructions or the omission of a required

warning from a Rule 11 plea colloquy—are not structural because they do not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Greer* at 2100, citing *Neder* at 1827. This Court acknowledged, however, that "there may be cases in which a defendant who is a felon can make an adequate showing on appeal that he would have presented evidence in the district court that he did not in fact know he was a felon when he possessed firearms." *Greer* at 2097. For that category of people, the failure to instruct on the proper mens rea would require reversal.

In this case, Mr. Lowe took the stand and repeatedly stated he never intended to have sex with the two teens. For instance, at one point in his testimony, in response to the question, "Sir, at any time, was it ever your intent to have sex with two minor children?" he unequivocally answered, "No, sir, it was not. That's why I stated earlier that I never intended on that."

Given that the "critical issue at trial—the only real point of contention—was Mr. Lowe's intent," and the fact that the jury instructions employed an erroneous mens rea, the Court of Appeals erred by applying a harmless error analysis.

CONCLUSION

This Court should grant certiorari and reverse the Court of Appeals.

DATED this 15th day of January, 2023.

s/ Thomas E. Weaver
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