No. 24-6242

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Kent Booher — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Kent Booher 54530-074
(Your Name)
Federal Correctional Institution
P.O. Box 725
(Address)
Edgefield, SC 29824
(City, State, Zip Code)

(Phone Number)

Issues Presented

I. Did the Court of Appeals err when it failed to address the issues raised by the appellant after his appellate counsel filed an Anders brief and moved to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967)?

II. Did the Court of Appeals err in its plain error review when it held that appellant had not suffered an effect on his substantial rights that may have affected the outcome of the trial when he was indicted and tried using an ex post facto change in the law?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

U.S. v. Kent Booher, 2024 FED App. 0379N (6th Cir.)
U.S. v. Kent Booher, 528 F. Supp. 3d 840 (E.D. Tenn. 2021)

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[✓] reported at 528 F. Supp. 3d 840; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[✓] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 6, 2024.

[✓] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 1591. Sex trafficking of children or by force, fraud, or coercion

(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;

2015.

Act May 29, 2015, in subsec. (a)(1), substituted "maintains, patronizes, or solicits" for "or maintains"; in subsec. (b), in para. (1), substituted "obtained, patronized, or solicited" for "or obtained", and in para. (2), substituted "obtained, patronized, or solicited" for "or obtained"; and in subsec. (c), substituted ", maintained, patronized, or solicited" for "or maintained", and substituted "knew, or recklessly disregarded the fact, that the person" for "knew that the person".

Cl 3. Bill of attainder—Ex post facto laws.

No Bill of Attainder or ex post facto Law shall be passed.

Statement of the Case

After a six day trial, a jury found petitioner guilty of all five sex offense charges contained in the superseding indictment. The case narrative recited by the appellate court represents the government's case against the petitioner as the trial defense counsel declined to present any defense. Defense counsel failed to move for a Rule 29(a) Federal Rules of Criminal Procedure (FRCrP) motion and failed to seek a motion for a new trial pursuant to Rule 33, FRCrP. As a result, no errors at the trial were preserved for de novo review by the appellate court. See United States v. Childs, 539 F.3d 552, 558 (6th Cir. 2008). Petitioner's appellate counsel, recognizing no trial errors were preserved, filed an Anders brief and motion to withdraw. See Anders v. California, 386 U.S. 738 (1967).

In response to the Anders brief, petitioner filed a pro se brief as allowed. Anders at 744. That brief was filed January 31, 2003. Shortly thereafter, the Sixth Circuit Court of Appeals denied appellate counsel's motion to withdraw and directed her to review the jury instruction and transcript of the jury selection. From the multiple issues raised by the now pro se appellant's brief, appellate counsel filed a new brief arguing ex post facto application of the law in Count Three of the superseding indictment. No other issues were addressed. Appellate counsel was unaware or disinclined to challenge the Sixth Circuit's decision in Childs as was suggested in U.S. v. Burris, 999 F.3d 973 (6th Cir. 2021). "A published decision of this Court (referring to the Sixth Circuit Cour of Appeals) remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision, or this Court sitting en banc overrules the prior decision." Darrah v. City of Oak Park, 255 F.3d 301, 309 (6th Cir. 2001). Because the manifest miscarriage of justice/devoid of evidence standard of review mirrors the, "no evidence" rule that was rejected in Jackson v. Virginia, 443 U.S. 307 (1979), the Burris Court opined that the

Sixth Circuit may have chosen the wrong side of the circuit split. See ; especially U.S. v. Delgado, 672 F.3d 320 (5th Cir. 2012)(en banc)(strong criticism of the miscarriage of justice/devoid of evidence rule). Your petitioner posits that this petition provides the opportunity to change what Burris invited.

Petitioner's first, fourth and fifth counts of his indictment all allege attempts that the government's proof at trial failed to establish guilt beyond a reasonable doubt. Both the first and fifth counts of the indictment accuse the petitioner of attempting to commit the crime of enticement of a minor to engage in unlawful sexual activity with him. To establish his guilt, the government was required to prove his intent and that he did some overt act that was a substantial step towards committing the crime. U.S. v. La Pointe, 690 F.3d 434 (6th Cir. 2012). Accord U.S. v. Alebbini, 979 F.3d 537 (6th Cir. 2020.) See also Braxton v. U.S., 500 U.S. 344 (1991); U.S. v. Gladdish, 536 F.3d 646 (7th Cir. 2008).

IN count four, the government offered no proof that any subsequent or substantial overt act was taken by the petitioner or the alleged victim, K.V. The government even admitted that the one naked picture of K.V. was taken by her, was sent to petitioner as part of her "advertising," was deleted when he discovered her true age and he was not in possession of that image; hence the fact he was not charged with possession of child pornography.

None of these issues were mentioned or decided in the decision affirming petitioner's convictions. The offer of Anders for a defendant/appellant to submit issues believed to be nonfrivolous is illusory if the appellate courts do not consider them or decide them, as appears to be the case here.

On November 19, 2019, petitioner was indicted for sex trafficking of a child in violation of 18 U.S.C. 1591(a)(1) for commercial sex with a child prostitute from about November 2012 to June 2013. The indictment charged him with knowingly enticing, patronizing and soliciting the minor child for a commercial sex act. During the time alleged in the indictment, the statute did not include the verbs patronizing or soliciting. Those changes were added in 2015 in apparent response to the acquittal of the defendants in U.S. v. Jungers, 834 F. Supp. 2d 930 (D.S.D. 2011), reversed at 702 F.3d 1066 (8th Cir 2013). The indictment against Booher did not allege that he "obtained" a commercial sex act from the minor.

Petitioner seeks to reverse his conviction on this charge because the indictment and the court's jury instruction charged him with an ex post facto application of the amended version of 18 U.S.C. 1591. Judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law as if it were enacted by Congress in violation of Article I, Section 9 of the Federal Constitution. See Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964). Alternatively, the retroactive application of the amended statute violated petitioner's due process rights. Compare U.S. v. Marcus, 560 U.S. 258 (2010) (applying due process clause to ex post facto judicial decisions). Regardless of how the error is characterized, the error affected petitioner's substantial right to due process and acted to prejudice the outcome of his trial.

Criminal defendants are often left to the caprice of marginally competent or ineffective appointed counsel who forfeit reversible errors by failing to raise those errors at trial. See Hormel v. Helvering, 312 U.S. 552 (1941). Thankfully, Rule 52(b), Federal Rules of Criminal Procedure gives courts authority to correct forfeited errors if an error is plain, affects substantial rights of the defendant, and the error affects the fairness, integrity, or public reputation of judicial proceedings. U.S. v. Young, 470

U.S. 1 (1985).

While it seems readily apparent that the indictment and trial of the petitioner using an after the fact amended version of 18 U.S.C. 1591 was in error, it challenges all reason and belief that two separate defense attorneys, two Assistant U.S. Attorneys, an appellate defense counsel and a senior trial judge all failed to notice this "plain" error. The error was only discovered when petitioner finally obtained a copy of his indictment form his appellate attorney after she filed the Anders brief and moved to withdraw. Petitioner raised the issue, along with others in his pro se filing authorized by the Anders decision.

Accepting an error as "plain", the court of appeals has authority to order a correction if the error affects substantial rights and seriously affects the fairness, integrity or public reputation of the judicial proceeding. While Rule 52(b) is permissive, not mandatory, in criminal cases where the life or liberty of the defendant is at stake, courts in the exercise of sound discretion may notice forfeited errors. See Sykes v. U.S., 204 F. 909 (8th Cir. 1913). Accord Crawford v. U.S., 212 U.S. 183 (1909).

In the court below, the decision focused on the jury charge as the source of error and stated, "[i]n the context of challenges to jury instructions, [p]lain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice. U.S. v. Newsom, 452 F.3d 593 at 605 (6th Cir. 2006). In the case at bar, the trial judge cited three operative verbs as choices the jury could find to convict. Two of those choices incorrectly stated the law. No one knows which of the three actions, or combinations of actions, the jury chose to convict petitioner. No one knows if the choices of the jury were unanimous. One of petitioner's due process rights is the right to a unanimous jury verdict as encompassed in his Sixth Amendment right to a jury trial. See Ramos v. Louisiana, 590 U.S. 83, 115-132 (2020). Further, the appeals court's attempt

to shoehorn the verb "obtains" into the charge by arguing that "patronized" and "solicited" were encompassed in its meaning, borders on a constructive amendment of the indictment and would require dismissal. See Stirone v. U.S., 361 U.S. 212 (1960). Compare Cole v. Arkansas, 333 U.S. 196 (1948).

Finally, the indictment caused petitioner's defense counsel to defend the charge based on elements that focused on the payment for sex acts and less so on who enticed whom. See Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time... of the offense is an ex post facto law). The evidence was clear that petitioner was introduced to the minor by her pimp for the purpose of both of them obtaining money for sex. Both admitted that the minor and her pimp (house mother) lied about the girl's age to induce him to participate. The proof of patronizing was abundantly clear but irrelevant given that the language of the indictment was in error. With all the parties at trial operating under the assumption that proof of patronizing was sufficient, defense counsel spent little effort working to disprove the element of enticement, since the government's proof of patronizing was so unambiguous.

The fourth criterion of the plain error analysis is whether the error seriously affects the fairness, integrity or public reputation of the judicial proceeding. this Court has suggested that an error that does not affect the jury's verdict does not significantly impugn the fairness, integrity or public reputation of the proceeding. U.S. v. Cotton, 535 U.S. 625, 633 (2002). Without knowing the basis of the jury's verdict, no rational argument can be made that the jury verdict was not affected. We cannot know if the jury's verdict was unanimous on the element of enticement, patronizing or soliciting, or if the jury found the evidence beyond a reasonable doubt for all three. Due process requires some certainty, not speculation of how the jury reached its

decision, whether it was unanimous on each required element and whether all members of the jury would have found petitioner guilty if presented with only one choice. These charges should be reversed and dismissed.

TABLE OF AUTHORITIES

7th Cir.

U.S. v. Gladdish, 536 F.3d 646 (7th Cir. 2008) 5

8th Cir

U.S. v. Jungers, 702 F.3d 1066 (8th Cir. 2013)

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U.S. Statutes

18 U.S.C. 1591

Rules

Rule 29(a), Federal Rules of Criminal Procedure

Rule 33, Federal Rules of Criminal Procedure

Rule 52(b), Federal Rules of Criminal Procedure

REASONS FOR GRANTING THE PETITION

When a person's life and liberty are at stake, "close enough" should never be "good enough."

The government made a mistake that was accidental or deliberate. If I had not been persistent about my defense and my innocence, my case would have been swept under the carpet by three incompetent lawyers and an appeal that seems more interested in preserving a conviction than seeking the truth.

Please hear my case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kent Booker

Date: December 2, 2024