

No. _____

In The
SUPREME COURT OF THE UNITED STATES

TERRELL BANKER

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in instructing the jury that a conviction under 18 U.S.C. §§ 1591 for Sex Trafficking of a Minor (Counts 1 and 2) allows proof that Petitioner knew or was in reckless disregard of the fact that the victim was a minor at the time of the offense, as opposed to requiring proof that Petitioner knew that the victim was a minor?

2. Did the trial court err in instructing the jury that a conviction under 18 U.S.C. §§ 2422 for Enticement of a Minor (Count 3) allows proof by strict liability that the victim was a minor at the time of the offense, as opposed to requiring proof that Petitioner knew that the victim was a minor?

PARTIES

1. TERRELL BANKER, Defendant and
Petitioner
2. UNITED STATES OF AMERICA,
Government and Respondent

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STATUTES AT ISSUE

1. 18 U.S.C. § 1591

As amended Dec. 23, 2008, P.L. 110-457, Title II, Subtitle C, § 222(b)(5), 122 Stat. 5069

2. 18 U.S.C. § 2422

As amended July 27, 2006, P.L. 109-248, Title II, § 203, 120 Stat. 613.

OPINIONS BELOW AND JURISDICTION

This appeal follows a final judgment and sentencing in a criminal case over which the district court had jurisdiction pursuant to 18 U.S.C. § 3231. The judgment was affirmed by a decision of the United States Court of Appeals for the Fourth Circuit on November 14, 2017. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

On May 21, 2015, the Defendant was charged in the superseding indictment with Conspiracy to Engage in Sex Trafficking of a Minor in violation of 18 U.S.C. §§ 1594(c) and 1591 (Count 1); Sex Trafficking of a Minor in violation of 18 U.S.C. §§ 1591 (Count 2); and, Enticement of a Minor in violation of 18 U.S.C. §§ 2422 (Count 3). JA 14.¹

The Government alleged that between February 1, 2015, and March 31, 2015, Mr. Banker and a co-defendant recruited C.O. to engage in prostitution, and that on one occasion, Mr. Banker transported C.O. to perform a commercial sex act. JA 16. The Government further alleged that Mr. Banker knew or was in reckless disregard of the fact that C.O. was a minor at the time of the offense, in violation of 18 U.S.C. §§ 1591 and 2422. Mr. Banker pleaded not guilty to each of the charges, and a three-day jury trial was scheduled.

Prior to trial, the Government filed a Motion *in Limine* regarding the knowledge elements for 18.2 U.S.C. §§ 1591 and 2422. JA 19. The Government asked the Court to instruct the jury that in a prosecution under § 1591, the Government could satisfy its burden with respect to the Defendant's awareness of the victim's age by proving any of the following: (a) the Defendant knew the victim was

¹ "JA" references the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit.

under the age of 18 years; (b) the Defendant recklessly disregarded the fact that the victim was under the age of 18 years; or, (c) the Defendant had a reasonable opportunity to observe the victim. JA 19. As to § 2422, the Government contended it was a strict liability crime and it need not prove Mr. Banker knew that the victim was under the age of 18 years at the time of the offense. JA 20.

The trial court granted the motion in part and denied the motion in part, and held that the knowledge element under § 1591 required proof that Mr. Banker “knew or was in reckless disregard of the fact that Minor 1 was under the age of eighteen” at the time of the offense. JA 29. The trial court held it would instruct the jury that the Government “is not required to prove beyond a reasonable doubt that the defendant knew Minor 1 was under the age of 18, but, in the alternative, may discharge its burden by proof beyond a reasonable doubt that the defendant acted with reckless disregard to the fact that Minor 1 was under the age of 18.” JA 29.

The trial court rejected any argument that in a prosecution under § 1591 the Government should have to prove the Defendant possessed actual knowledge of the victim’s age in order to meet its burden under the statute. *Id.*

As to § 2422, the trial court agreed with the Government that it need not prove any knowledge whatsoever with respect to the victim’s age, and that the crime was strict liability insofar as the minor

status of the victim. JA 30. The trial court held that in a prosecution under § 2422, it would instruct the jury that the Government could meet its burden by proving that the victim was a minor at the time of the offense regardless of Mr. Banker's knowledge of the victim's age. *Id.*

On October 6, 2015, a jury trial was held on the charges. At the close of the Government's evidence, counsel for Mr. Banker made a Motion for Judgment and Acquittal, and it was denied. JA 351. No evidence was offered by Mr. Banker. *Id.*

The trial court instructed the jury that as to Counts 1 and 2, it should find Mr. Banker guilty under 18 U.S.C. § 1591 of Sex Trafficking of a Minor if the Government proved, *inter alia*, that he "knew or was in reckless disregard of the fact that" the victim was under the age of 18 years at the time of the offense. JA 27-28, 36. As to Count 3, the trial court instructed the jury that it should find Mr. Banker guilty under 18 U.S.C. § 2422 of Enticement of a Minor if the Government proved, *inter alia*, that he enticed the victim to engage in prostitution, and she was a minor at the time of the offense, regardless of his knowledge of her age. JA 41.

During deliberations, the jury sent a note to the trial court, which said, "We unanimously agree on Count 3 [the strict liability crime]; we cannot unanimously agree on Counts 1 and 2 [the crimes requiring some proof of knowledge of the victim's age at the time of the offense]." JA 872. Finally, after

resuming deliberations, the jury found Mr. Banker guilty of each of the charges.

On June 28, 2016, the Court sentenced Mr. Banker to an active term of imprisonment of 156 months to run concurrently for Counts 1, 2, and 3. JA 876. On July 8, 2016, a Notice of Appeal was filed. JA 881. On November 14, 2017, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the trial court. This appeal followed.

STATEMENT OF FACTS

According to the evidence presented at trial, on April 1, 2015, shortly after midnight, Officer Kinga Baker with the Roanoke Police Department, responded to a call for service at the Days Inn in Roanoke, Virginia. JA 65. When she arrived on scene, she observed a tractor trailer parked in the hotel lot. JA 67. A white male, later identified as Bobby Peters, was sitting in the driver's seat. *Id.* A white female, later identified as C.O., was sitting in the passenger's seat. JA 68.

Mr. Peters testified that earlier that evening, he had exchanged electronic messages with a phone number he believed belonged to Mr. Banker to meet with C.O. in the parking lot of the hotel to engage in prostitution. JA 87-96. Mr. Banker later arrived in a black pick-up truck. JA 97. Mr. Banker was accompanied by C.O. in the pick-up. JA 99. Mr. Peters said that he gave Mr. Banker a sum of \$200 in two, hundred-dollar bills, and asked that he drop off C.O. and go make change at a gas station across the street. JA 100. After Mr. Banker left, police arrived soon thereafter, and asked Mr. Peters and C.O. to get out of the truck. JA 104.

In an interview with police, Mr. Peters admitted that he and C.O. had engaged in an act of prostitution. JA 106. However, Mr. Peters denied knowing that C.O. was underage. JA 108. Neither he, nor Mr. Banker, nor C.O., made any mention of her age at the time of the offense that evening, and

he testified that he had “no idea” that she was under the age of 18 years based on his interactions with her. *Id.* Mr. Peters was charged with solicitation, a misdemeanor, in the Roanoke City General District Court and received six months of probation. JA 109.

C.O. testified that she was 17 years, 10 months, at the time of the offense when she met with Mr. Peters in the hotel parking lot. JA 115. She had attended high school in Salem, Virginia, then in February 2015 left home to live with a woman named Laura Cook. JA 119. C.O. had met Ms. Cook when she had gone to the home of a man to get heroin from him. JA 121.

When C.O. moved in with Ms. Cook, C.O. said she “was 18.” JA 122. She later told Ms. Cook she was 17 years-old. JA 124. Ms. Cook told her she was not surprised and that she would “usually tell her other girlfriends to say they were older than what they really were.” JA 124. On Facebook, C.O. listed a false birth date, June 16, 1996, claiming she was 18 years-old. JA 127. C.O. said she would list the false birth date claiming she was older, because she “hung out with older people. I liked older people, I wanted people to think I was of age, because some people don’t like hanging out with minors.” JA 128.

Mr. Banker, a mutual friend of Ms. Cook, began messaging with C.O. via Facebook. *Id.* At the time Mr. Banker and C.O. communicated via Facebook, C.O. continued to claim on the website that she was 18 years-old. JA 127. Soon after, Mr.

Banker and Ms. Cook began spending time with C.O. at various parties. JA 136-37. Drugs were involved. *Id.* They would hang out with another friend, Taquilla Hall, whom C.O. also told she “was 18.” JA 139. C.O. later told Ms. Hall she was 17, after she was unable to get into a club one night, but Mr. Banker was not present that evening. JA 142-46. C.O. and Mr. Banker continued to communicate via Facebook where C.O. falsely listed her age. JA 147-48. She said that they also continued to get together with Ms. Cook and other individuals to use drugs, and that C.O. on occasion would exchange sex for drugs, and that they would stay at various homes or hotels. JA168-70.

The day prior to the incident, Ms. Cook, Mr. Banker, and C.O. were at Ms. Cook’s house. Ms. Cook and Mr. Banker were sitting in his pick-up truck outside the house. JA 174. C.O. walked outside up to the truck. *Id.* She overheard Ms. Cook say to Mr. Banker that C.O. was “17” and “what are going to do with her?” *Id.* Ms. Cook also claimed she told Mr. Banker that C.O. was “17” while sitting in the truck at the house one day. JA 313. Ms. Cook said that they discussed C.O. engaging in prostitution so that she could help pay rent and living expenses while staying with Ms. Cook. JA 313. Ms. Cook said Mr. Banker responded, “Okay, tell her I need some pictures and I can set her up with some people.” *Id.*

Ms. Cook, who was a co-defendant that reached a plea agreement prior to trial, is the only

Government witness who is able to testify that Mr. Banker knew anything about C.O.'s age. C.O. tells a different story. She recalled the comment, above, but she testified that Mr. Banker did not react to Ms. Cook's remark at all and his face was "blank." JA 174. C.O. could not testify that Mr. Banker even heard the comment about her age. *Id.* C.O. said that they sat in the truck a while longer and did not talk any more. JA 175. C.O. said she never told Mr. Banker directly she was a runaway or her true age because he would "flip out." JA 175.

The following evening, C.O. testified that she exchanged electronic messages with a number she believed belonged to Mr. Banker about engaging in prostitution with Mr. Peters at the hotel parking lot. JA 178-181. C.O. testified that Mr. Banker later arrived, drove her to the hotel, and met with Mr. Peters. JA 182-83. She said that she and Mr. Peters discussed the act, and then Mr. Banker dropped her off and left to drive to the gas station. JA 184-85. Police later arrived on scene and she was eventually taken to a detention center. JA 186-87. Several days later, Mr. Banker is charged with the instant offenses.

ARGUMENT

A writ should be granted in this case to resolve the proper construction of the scienter requirement in criminal prosecutions under 18 U.S.C. § 1591 and 18 U.S.C. § 2422.

Mr. Banker's convictions should be set aside because the trial court improperly instructed the jury for two main reasons raised in this appeal to the Supreme Court of the United States:

first, the plain language of 18 U.S.C. § 1591 requires proof that Mr. Banker acted “knowingly” and not just in reckless disregard of his knowledge of the age of the victim; and,

second, the rule of lenity requires construing 18 U.S.C. § 2422(b) to require a *mens rea* element with regard to the age of the victim.

I. The Trial Court Improperly Instructed the Jury as to Counts 1 and 2 Because the Plain Language of Section 1591 Requires Proof that Mr. Banker Acted “Knowingly” and Not Just in Reckless Disregard of the Age of the Victim

The trial court improperly instructed the jury as to the *mens rea* requirement of Section 1591 when it allowed the Government to meet its burden by proving Banker knew, or recklessly disregarded the fact that, the victim was a minor.

The plain language of Section 1591 requires proof that Banker had actual knowledge that the victim was under the age of 18 years old at the time of the offense. As the Government notes, Section 1591 was amended after the instant offense date.

The applicable version of Section 1591 states in pertinent part:

(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, or maintains by any means a person;

knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion 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. § 1591 (2008) (emphasis added).

The statute provides an enhanced penalty under subsection (b) if the act is committed with knowledge that (i) the person has been recruited through use of force, or (ii) the person is a minor. *Id.*

The key question is whether the knowledge requirement providing for the enhanced penalty under § 1591 applies equally across each category based on the plain language of the statute as drafted.

Prior to trial, the Government moved the trial court, over Mr. Banker's objection, to instruct the jury that the Government need not prove Mr. Banker had actual knowledge of the victim's age to support a conviction under § 1591.

The trial court agreed with the Government and adopted in part the proffered knowledge requirement for the victim's age. On Count 1, the trial court instructed the jury that the Government could prove that Mr. Banker acted with the requisite knowledge if he conspired to violation § 1591 "in reckless disregard of the fact that" the victim was under the age of 18 years. JA 405-6. On Count 2, the trial court against instructed the jury that the Government need not prove he knew the victim's age; instead, the Government could meet its burden if it showed Mr. Banker violated § 1591 if he acted "in reckless disregard of the fact that" the victim was under the age of 18 years. JA 408.

The plain language of § 1591(a) requires a different interpretation of the knowledge requirement. The statute criminalizes anyone who "knowingly... recruits...by any means a person...knowing, or...in reckless disregard of the fact, that means of force, threats of force, fraud, coercion 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,... ." 18 U.S.C. § 1591(a).

The statute provides an enhanced penalty under subsection (b) if the act is committed with knowledge that (i) the person has been recruited through use of force, or (ii) the person is a minor. *Id.* The key question is whether the knowledge requirement providing for the enhanced penalty under § 1591 applies equally across each category based on the plain language of the statute as drafted.

Based on the structure of the subsections, a different knowledge requirement applies to each. The sub-clause for use of force is set off by a series of commas. Thus, the knowledge requirement for use of force is "knowing, ...or in reckless disregard of the fact." The sub-clause for age is set apart, not within the comma set. There is no mention of "recklessly disregarding" an age. Therefore, the scienter for age is defined only by the initial "knowing" at the start of the section.

The Government relied on Congressional intent to justify its expansive interpretation of Section 1591, in order to match the plain text of the statute with its legislative purpose. However, while Congress may have intended another result, any ambiguity in criminal statutes must be construed in favor of the accused. *Liparota v. United States*, 471

U.S. 419 (1985) ("In addition, requiring mens rea is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see also United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.")).

In summary, the plain language of Section 1591 requires proof that a defendant "knowingly" recruited or transported a person while "knowing" such person was under the age of 18 years. Having failed to properly instruct the jury, Mr. Banker's conviction under Counts 1 and 2 should be set aside.

II. The Trial Court Improperly Instructed the Jury as to Count 3 Because the Plain Language of Section 2422(b) Requires Proof Mr. Banker Acted "Knowingly," as Opposed to Strict Liability, with Regard to the Age of the Victim.

Under Count 3, the Government charged Mr. Banker with violating 18 U.S.C. § 2422(b), to wit, knowingly enticing a person to engage in prostitution, where such person was a minor under the age of 18 years. Section 2422(b) states:

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.

18 U.S.C. § 2422(b) (emphasis added).

Prior to trial, the Government moved the trial court, over Mr. Banker's objection, to instruct the jury that the Government need not prove Mr. Banker had any knowledge of the victim's age in order to support a conviction under § 2422(b). The trial court agreed, and the jury was instructed as follows:

For Count Three, I further instruct you that the Government need not prove that the knew that Minor 1 was under the age of 18, but only that Minor 1 was, in fact, under the age of 18 at the time she allegedly engaged in prostitution.

JA 411-12.

The trial court improperly instructed the jury as to the knowledge requirement in § 2422(b), and in doing so, lowered the Government's burden of proof. Rather than require the Government to prove that Mr. Banker had at least some knowledge of the victim's age, as Counts 1 and 2 required – and with

which, apparently, the jury struggled initially in achieving unanimity in its verdict, when tasked with weight Mr. Banker's knowledge of the victim's – the trial court disregarded the knowledge requirement in § 2422(b) and failed to give full effect to each of the elements required by the statute.

Section 2422(b) punishes anyone who “knowingly persuades, ... any individual who has not attained the age of 18 years, to engage in prostitution.” The term “knowingly” modifies both “persuades” and “any individual who has not attained the age of 18 years.” The criminal intent of “knowingly” acting in violation of section 2422(b) punishes not merely the act of persuading a person to engage in prostitution, which is covered separately by 18 U.S.C. § 2422(a), but the act of persuading “any individual who has not attained the age of 18 years.”

Accordingly, pursuant to the plain language of section 2422(b), the trial court improperly instructed the jury as to whether the Government was required to prove that Mr. Banker had some requisite knowledge of the victim's age at the time of the offense. The statute required that the Government show both that Mr. Banker “knowingly” acted with knowledge that the individual upon whom he was acting was a minor under the age of 18 years. Having failed to properly instruct the jury, Mr. Banker's conviction under Count 3 should be set aside.

In *Flores-Figueroa v. United States*, the Supreme Court of the United States considered the *mens rea* requirement for a statute prohibiting aggravated identity theft, 18 U.S.C.S. § 1028A(a)(1), which penalized anyone who “*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person*.” 556 U.S. 646, 650 (2009). The Court addressed whether the word “knowingly” modified only the verb that followed it, or the verb and its object, as is the case here. *Id.* at 651. The Court held that the plain construction of “knowingly” applied both to the verb *and* the object:

In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence....

Id. The Court rejected the Government’s contention the word “knowingly” applied only to a verb without its full object. *Id.* at 652. Rather, the natural interpretation of the word “knowingly” for an ordinary listener applies both to its verb and its object, under plain rules of construction. *Id.* Accordingly, within the context of the criminal statute at issue, the Court concluded that the *mens rea* requirement applied to each element of the offense. *Id.*

Here, the Government has argued that *Flores-Figueroa* has no application because section 2422 is an offense against a minor, which elevates it into a category of cases where no knowledge that the victim is a minor is necessary. But in *Flores-Figueroa*, the Court seemed to address this argument and noted that even if a criminal statute has been enacted for the protection of minors, a court must still apply ordinary rules of construction consistent with plain language. *Id.* at 652-53 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (holding in a challenge to the Protection of Children Against Sexual Exploitation Act of 1977 that the term “knowingly” extended both to the criminal act and to the age of the victim)).

Accordingly, the same result as *Flores-Figueroa* should follow here. Pursuant to the plain language of section 2422(b), the Government was required to prove that Mr. Banker had some requisite knowledge of the victim’s age at the time of the offense. The statute required that the Government show both that Mr. Banker “knowingly” acted with knowledge and that the individual was a minor under the age of 18 years. Having failed to properly instruct the jury, Mr. Banker’s conviction under Count 3 should be set aside.

CONCLUSION

The petition for writ of certiorari should be granted.

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