No. 08-872

In the Supreme Court of the United States

FRANCES DARLENE DEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a case charging a conspiracy to defraud under 18 U.S.C. 286, the evidence was sufficient to establish that petitioner conspired to submit a claim under a military pension for survivor's benefits that she knew, or deliberately avoided knowing, was false.

2. Whether the district court plainly erred in failing to hold that an Arkansas statute that prohibits a grandfather from marrying an adopted granddaughter is unconstitutional.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 527 F.3d 577.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2008. A petition for rehearing was denied on October 9, 2008. The petition for a writ of certiorari was filed on January 6, 2009. 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 Eastern District of Kentucky, petitioner was convicted of conspiring to defraud the United States Department of Defense (DoD), in violation of 18 U.S.C. 286, and making false statements to a federal agent, in

violation of 18 U.S.C. 1001. Pet. App. 57a. Petitioner was sentenced to 27 months of imprisonment on each count, to be served concurrently and to be followed by three years of supervised release. She was also ordered to pay $209,230.93 in restitution. *Id*. at 8a, 58a-64a. The court of appeals affirmed. *Id.* at 1a-55a.

1. In 1983, at the age of 18, petitioner was adopted by John Watson. After petitioner married and had children, Watson lived with petitioner's family in Kentucky. Watson was receiving a full military pension. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

In 1992, petitioner met Nelva Holland, a 19-year-old first cousin. After Holland moved in with petitioner's family, petitioner and her husband adopted Holland so that Holland could be considered an "eligible dependent" for health insurance purposes. Pet. App. 4a; Gov't C.A. Br. 3-4. After an argument, petitioner evicted Holland from the house, only to let her move back in on one condition: that Holland marry Watson so Holland could collect Watson's military pension payments as his surviving spouse once he died. Holland agreed. In July 1996, petitioner traveled with Watson and Holland to Arkansas where Watson and Holland were married by a justice of the peace. Pet. App. 4a-5a; Gov't C.A. Br. 4-5.

Watson and Holland did not hold themselves out publicly as husband and wife, shared no romantic feelings for each other, and slept in separate bedrooms. Pet. App. 5a; Gov't C.A. Br. 5-6. Neighbors did not know that the two had married, although one friend did learn of the marriage after petitioner informed her that she had "solved the situation with the annuity." Pet. App. 5a (citation omitted).

In December 1997, 17 months after marrying Holland, Watson died, and petitioner applied for a Survivor Benefit Plan (SBP) annuity for Holland. At some point after the government started paying the SBP annuity, the funds went straight to petitioner, who gave Holland some of the money. Pet. App. 5a; Gov't C.A. Br. 5-7.

By 2005, the relationship between petitioner and Holland had deteriorated. Petitioner reported to DoD that the marriage between Watson and Holland was illegal and that Holland was perpetrating a fraud on the federal government. During subsequent conversations with federal investigators, petitioner falsely claimed that she did not learn of Watson's marriage to Holland until October 2004. DoD terminated Holland's SBP annuity in October 2005. Pet. App. 5a-6a; Gov't C.A. Br. 7-8.

2. A federal grand jury in the Eastern District of Kentucky returned a superseding indictment charging petitioner with conspiring to defraud DoD, in violation of 18 U.S.C. 286, and making false statements to a federal agent, in violation of 18 U.S.C. 1001. Pet. App. 2a, 57a.[1] At trial, the government argued *inter alia* that Holland's claim for a SBP annuity was false because, under Arkansas law, Watson could not marry his adopted grandchild and the marriage was thus void. *Id.* at 9a-12a. The district court took "judicial notice" that "a marriage between a grandfather and his adopted granddaughter is prohibited by Arkansas state law." *Id.* at 8a; see Ark. Code Ann. § 9-11-106(a) (Mitchie 2006) ("All marriages between parents and children, including grandparents and grandchildren of every degree * * *

[1] This indictment also charged Holland with conspiracy to defraud, and she pleaded guilty. Pet. App. 6a.

are declared to be incestuous and absolutely void."); *id.* § 5-26-202(a) (defining "incest" to include a "purport-[ed]" marriage with someone known to be an "adopted grandchild").

3. The court of appeals affirmed. Pet. App. 1a-55a.

a. As to the 18 U.S.C. 286 count, the court of appeals reasoned that petitioner's claim was false if the marriage between Watson and Holland was illegal and void.[2] Pet. App. 9a-10a, 29a. After agreeing with the district court that Arkansas law rendered the marriage void, *id.* at 16a-22a, the court of appeals rejected petitioner's claim that the law, as so construed, was unconstitutional, *id*. at 22a-25a. The court noted that, because petitioner had not raised the constitutional challenge below, it could be reviewed for plain error only. *Id*. at 22a-23a (citing Fed. R. Crim. P. 52(b)). The court concluded that "[a]ny possible unconstitutionality of Arkansas's marriage statute is not 'clear under current law.'" *Id*. at 25a (quoting *United States* v. *Olano*, 507 U.S. 725, 734 (1993)).

b. The court of appeals also rejected petitioner's argument that the evidence was insufficient to prove a violation of Section 286. It concluded that the elements of a Section 286 offense were "(1) the defendant entered into a conspiracy to obtain payment or allowance of a claim against a department or agency of the United States; (2) the claim was false, fictitious, or fraudulent;

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[2] The court rejected the government's alternative argument that petitioner could be convicted under Section 286, whether or not the marriage was invalid under Arkansas law, simply because the marriage was a sham (*i.e.*, entered into for improper motives). Pet. App. 10a-11a n.1 ("The SBP statute does not provide a basis for the sham-marriage theory, and no courts have ever indicated that such a sham-marriage theory would support a conviction under § 286.").

(3) the defendant knew or was deliberately ignorant of the claim's falsity, fictitiousness, or fraudulence; (4) the defendant knew of the conspiracy and intended to join it; and (5) the defendant voluntarily participated in the conspiracy." Pet. App. 28a.

The court focused on the third element, *i.e.*, whether the evidence was sufficient to show that defendant knew or was deliberately ignorant of the falsity of the claim. Based on the trial record, the court held that "the government adduced sufficient evidence to show that [petitioner] knew or was deliberately ignorant of the falsity of her claims." Pet. App. 32a. The court relied on, *inter alia*, evidence that made it "likely that * * * [petitioner] assumed that the marriage would be equally void and equally false in Arkansas as in Kentucky;" petitioner's "pattern of skulking and scheming" demonstrating that "she had a sense that what she was doing was wrong;" and the fact that petitioner had called various government agencies to inform them that Holland was defrauding the government. *Id.* at 32a-33a. The court also clarified that, even though it had rejected the government's sham-marriage theory (p. 4 note 2, *supra*), petitioner's intent to create a sham marriage helped to establish that she knew or was deliberately ignorant of the falsity of the SBP claim. Pet. App. 34a-36a. Accordingly, the court concluded that "a rational juror could certainly conclude beyond a reasonable doubt from the evidence presented that [petitioner] did possess knowledge of the falsity of the SBP claims." *Id.* at 34a.[3]

[3] The court of appeals also affirmed petitioner's conviction under 18 U.S.C. 1001 based on her false statements to federal agents about when she first learned of the marriage between Watson and Holland, and affirmed the district court's calculation of the amount of loss for Sentencing Guidelines purposes. Pet. App. 36a-41a, 44a-48a. Petitioner does

c. Judge Gilman dissented, as to the sufficiency of evidence on the knowledge element of the Section 286 claim. Pet. App. 48a-55a. In his view, the record contained "no evidence indicating that [petitioner] knew or was deliberately ignorant of the fact that her claim for benefits was fraudulent *because the marriage was illegal*—as opposed to being fraudulent because the marriage was a sham." *Id.* at 50a.

ARGUMENT

Petitioner renews two claims on appeal: (1) that the government failed to prove the requisite intent element under 18 U.S.C. 286, *i.e.*, that she knew or deliberately avoided knowing that the marriage between Watson and Holland was void under Arkansas law (Pet. 7-12); and (2) that the Arkansas statute that prohibited Watson's marriage to Holland is plainly unconstitutional (Pet. 12-15). Petitioner does not allege any conflict among the courts of appeals, but rather alleges merely factbound misapplication of correct legal standards. Accordingly, neither claim warrants this Court's review.

1. Petitioner alleges that the record lacked sufficient evidence that she had the requisite intent under Section 286, which petitioner contends is "knowledge or deliberate ignorance of the legal falsity, fictitiousness, or fraudulence of the basis of the claim." Pet. 7. That legal standard is identical to the one set forth by the court of appeals, requiring that "the defendant knew or was deliberately ignorant of the claim's falsity, fictitiousness, or fraudulence." Pet. App. 28a. There is thus no conflict between the petitioner's preferred legal standard and the one articulated below, nor does petitioner

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not seek review of those determinations in this Court.

allege any conflict among the courts of appeals on that standard.

As such, petitioner's claim, based on the dissenting opinion (Pet. 8-9), reduces to an alleged misapplication of the agreed upon legal standard to the facts of this case. See Pet. App. 34a ("The heart of the dissent's disagreement with our holding * * * is not over a question of law but of fact."). The court of appeals held that the record contained sufficient evidence from which a rational jury could conclude that petitioner knew or was deliberately ignorant of the falsity of the SBP claims, including specifically that she knew or was deliberately ignorant of the fact that the Watson-Holland marriage was invalid under Arkansas law. See Pet. App. 32a-33a ("It is likely that, recognizing the absurdity and likely illegality of her claims, [petitioner] assumed that the marriage would be equally void and equally false in Arkansas as in Kentucky.); *id.* at 34a (finding "no shortage of proof" that "[petitioner] was deliberately ignorant of the falsity of her claims"); see also p. 5, *supra* (summarizing evidence). Any factbound disagreement with that determination does not warrant this Court's review.

2. Petitioner also contends (Pet. 12-15) that the Arkansas marriage statute is unconstitutional "on its face and as applied."[4] In particular, she maintains that because Arkansas law prohibits some adults who are related by adoption from marrying, it "clearly constitutes a direct and substantial interference with the right to marry;" does not serve any "sufficiently important state interest;" and is, in any event, not "narrowly tailored" to

[4] Petitioner does not renew her contention that the Watson-Holland marriage is not illegal under Arkansas law.

effectuate any interests it might serve. Pet. 13 (citation omitted).

As the court of appeals noted, petitioner did not raise this constitutional challenge in the district court. Pet. App. 22a-23a. Review therefore would be for plain error only. Fed. R. Crim. P. 52(b). "Plain error" exists only when, *inter alia*, the district court commits an error that is "clear" or "obvious" under existing law. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). It is neither "clear" nor "obvious" here that Arkansas's marriage law is unconstitutional.[5]

No court has ever held that Arkansas's marriage statute is unconstitutional based on petitioner's theories. Cf. *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error where there is no controlling case law and the circuit courts are split). To the contrary, as the court of appeals noted below (Pet. App. 24a-25a), the Arkansas Supreme Court has rejected a constitutional challenge to Arkansas laws prohibiting sexual relations between family members who are not related by blood. *Camp* v. *State*, 704 S.W.2d 617, 619-620 (Ark. 1986). Moreover, that the marriage statute is unconstitutional is far from "obvious" because the state has an important interest in prohibiting sexual relationships (and marriages) between close relatives who are not related by blood. As the Arkansas Supreme Court explained, such relationships damage the integrity of the family, "whatever [its] makeup." *Id.* at 619 (step-

[5] The government argued below that petitioner, who was not a party to the Arkansas marriage, lacked standing to raise her constitutional challenge. Pet. App. 22a. Although the court of appeals did not reach this issue (*id.* at 24a), it provides a further reason why this case presents an unsuitable vehicle for certiorari review.

father's incest with his step-daughter had completely disrupted the family); see *Heikkila* v. *State*, 98 S.W.3d 805, 807-808 (Ark. 2003) (incest statute "extends to step-relationships as well as blood relationships because sexual activity in step-relationships is equally disruptive of the family as would be sexual activity between blood relations"); accord *Marriage of MEW* v. *MLB*, 4 Pa. D. & C.3d 51 (Ct. C.P. 1977) (denying marriage license to brother and sister by adoption).

Petitioner does not allege any conflict with a decision of this Court or another court of appeals. Petitioner relies exclusively on *Israel* v. *Allen*, 577 P.2d 762 (Colo. 1978), in which the Colorado Supreme Court held that a state law that prohibited two siblings by adoption from marrying violated equal protection. That decision is easily distinguishable: it relied on the fact that the Colorado incest statute did not prohibit sexual relations between the would-be husband and wife. *Id.* at 764. Arkansas law, however, expressly defines a relationship between a grandfather and adopted granddaughter as "incest." Ark. Code Ann. § 5-26-202(a) (Mitchie 2006). Moreover, in *Israel* v. *Allen*, it appears that the parties seeking to marry never lived in the same household. See 577 P.2d at 763 (noting that the would-be groom was 18 and living elsewhere when his father married the mother of the would-be bride). Here, by contrast, Watson and Holland were living together in petitioner's household at the time of their marriage. That fact makes it particularly unlikely that the Arkansas marriage law was "clearly" unconstitutional as applied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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