No. 05-1082

In the Supreme Court of the United States

DUSTIN BUTTRICK, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to give petitioner's proposed instruction on the affirmative defense of abandonment.

2. Whether 18 U.S.C. 2423(b) (2000 & Supp. III 2003), which prohibits traveling in interstate commerce with the purpose of engaging in illicit sexual conduct with a minor, unconstitutionally criminalizes mere thought.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 432 F.3d 373.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2005. The petition for a writ of certiorari was filed on February 21, 2006. 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 District of New Hampshire, petitioner was convicted of traveling in interstate commerce with the purpose of engaging in illicit sexual conduct with a person under 18 years of age, in violation of 18 U.S.C.

2423(b) (2000 & Supp. III 2003). He was sentenced to 18 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. A1-A13.

1. On June 8, 2003, petitioner logged into a Yahoo! chat room and contacted via instant messaging an individual who used the screen name "baybeedawl88." Petitioner had visited chat rooms on numerous previous occasions and engaged in explicit sexual conversations with women; he had arranged to meet three or four of these women. Petitioner asked "baybeedawl88" her age, and she identified herself as a 14-year-old girl. The chat quickly became sexually graphic, and petitioner suggested that they get together to "fool around." Petitioner said he was from Dover, New Hampshire, falsely claimed that he was 19 years old, and stated that he had "fooled around" before with someone he had met online. Unbeknownst to petitioner, "baybeedawl88" was undercover Portsmouth Police Department Officer Frank Warchol. Pet. App. A4; Gov't C.A. Br. 4.

During subsequent e-mail conversations, petitioner engaged in other sexually explicit online conversations with "baybeedawl88." During a June 22, 2003, chat room conversation, petitioner suggested that they meet in person, and the two agreed to meet at 8:30 a.m. on Tuesday, June 24, 2003, at the New Hampshire State Liquor Store on the Route 1 traffic circle in Portsmouth, New Hampshire. Petitioner told "baybeedawl88" that he wanted to perform oral sex on her, and stated that they could "try new stuff" together. Petitioner stated that he would be driving a 1988 green Saab, and that he would bring "Durex" brand condoms to the meeting. Petitioner confirmed the meeting during a June 23, 2003, online conversation with "baybeedawl88," and

asked her to wear a skirt and no panties. Pet. App. A4-A5; Gov't C.A. Br. 5-6.

At approximately 8:33 a.m. on June 24, 2003, Portsmouth Police Department officers saw petitioner, driving a green Saab, travel around the Portsmouth traffic circle twice, looking into the liquor store parking lot. The officers ran a registration check of the Saab's Maine license plate and learned that it was registered to Dustin Buttrick of Eliot, Maine. Officer Peracchi stopped the Saab. Petitioner, who was very nervous and had visibly shaking hands, identified himself as Dustin Buttrick. He told the officer that he was in the area to meet a friend from Natick. Officer Warchol then approached the Saab, advised petitioner that he worked for the ICAC (internet crimes against children) task force, and referred to petitioner's online conversations with the underage girl. Petitioner replied that he knew what the officer was talking about, and admitted to having condoms in his pocket. Warchol arrested petitioner and recovered two condoms from his pocket, one of which was a "Durex" brand. Pet. App. A5; Gov't C.A. Br. 6-8.

Petitioner subsequently gave an audio-taped statement at the police station, admitting that he understood he had been arrested because he was going to meet a minor for sex, and further admitting that he knew "baybeedawl88" was 14 "going on 15." Pet. App. A6; Gov't C.A. Br. 8-9.

2. a. The theory of petitioner's defense at trial was that he never had any intent to engage in illicit sexual conduct. He testified that he had no intent to perform any sexual act with "baybeedawl88" or even to meet her. He claimed that he only intended to drive to the meeting place in New Hampshire from his home in Maine, some

five miles away, "just [to] see who this person was. I was just curious." He further testified that as he dressed before driving to the meeting, he grabbed various items from his dresser, including condoms. He claimed, however, that he did not bring the condoms in order to have sex with "baybeedawl88," but simply because he made it a habit to carry condoms with him. Pet. App. A4-A6.

Petitioner further testified that the weekend before the meeting, he had told a friend who was a part-time police officer about his on-line chats and the planned meeting with "baybeedawl88," telling him that he "would just drive by and take a look" and that he "was curious to see who [he] was talking to." His friend advised him that it was a bad idea. Pet. App. A4-A5; Gov't C.A. Br. 9.

Petitioner also admitted that, during his post-arrest interview, he had answered affirmatively when asked whether "'the purpose of this whole thing' was that he 'wanted to have sex with a 14-year-old girl,'" but he testified that he was not admitting guilt but merely acknowledging that he knew why he had been arrested. He further testified that, when asked during the interview whether he would have stopped had he seen a 14-year-old girl in the parking lot, he had replied "no" and said that he "would have been freaked out and . . . would have known it . . . wasn't a good idea." He insisted that had he seen a girl at the lot, he would not have had sex with her. Pet. App. A5-A6; Gov't C.A. Br. 9-10.

b. Petitioner requested an instruction based on Model Penal Code § 5.01(4) (Official Draft & Revised Comments 1985), that defines renunciation, or abandonment, as an affirmative defense to attempt crimes. The

requested instruction stated that if petitioner voluntarily and completely renounced or abandoned his effort to commit the crime charged in the indictment, the jury was required to acquit, and that the burden was on the government "to prove beyond a reasonable doubt that [petitioner's] renunciation or abandonment of the crime was not voluntary or complete." Pet. App. A8 & n.1, A11.

The district court declined to give the requested instruction on several grounds. *First*, the court found that the evidence in the case did not warrant such an instruction. C.A. App. 44-45. The court concluded that, based on petitioner's claim that he lacked the requisite intent when he crossed the state line, a reasonable jury could not find him guilty of the offense and "nevertheless find him not guilty based on renunciation on these facts." *Id.* at 44. *Second*, the court refused to graft onto Section 2423 a renunciation defense not adopted by Congress, reasoning that no federal court had recognized the defense even in the context of attempt crimes, that the application of the defense as propounded by petitioner was not well-established in the common law, and that the statute, which expressly recognizes certain affirmative defenses, did not provide for the defense of renunciation. *Id.* at 45-49. *Third*, the court held that recognizing the defense would be particularly inappropriate in petitioner's case, where he was charged with a completed crime, because that would extend the defense beyond that recognized by the Model Penal Code. *Id.* at 49-50. *Fourth*, the court refused to give the instruction because petitioner would only accept an instruction that placed the burden of persuasion on the government. *Id.* at 50-51. That placement of the burden was incorrect, the district court concluded, because (1) the defense

did not negate the elements of the charged crime, (2) petitioner was more likely to have access to the necessary information bearing on the defense, and (3) the affirmative defenses expressly set forth in Section 2423 placed the burden of persuasion on the defendant by a preponderance of the evidence. *Id.* at 50-52. The trial court gave petitioner's counsel the opportunity to propose a revised instruction that placed the burden of persuasion on petitioner, but counsel declined the offer. Pet. App. A13.

3. The court of appeals affirmed. Pet. App. A1-A13. The court rejected petitioner's challenge to the district court's refusal to give an instruction on abandonment or renunciation. The court noted that no federal court had expressly held that the defense of abandonment applies with respect to attempt crimes, *id.* at A10, and that "to date no court has accepted the theory" in the context of a Section 2423 prosecution. *Id.* at A12 n.3. The court declined to decide in this case whether the defense could ever be available for an attempt crime, or whether 18 U.S.C. 2423(b) (2000 & Supp. III 2003) was sufficiently like an attempt crime that the defense could in theory be applicable to a Section 2423(b) offense. Pet. App. A10. Instead, assuming the availability of such a defense, the court of appeals held that the district court correctly rejected petitioner's proposed instruction on the ground that it incorrectly placed the burden of persuasion on the government. The court of appeals reviewed the several grounds upon which the district court had relied in concluding that the burden of persuasion on any such defense should rest with petitioner, and it agreed with the district court's analysis. *Id.* at A11-A13.

The court also rejected petitioner's claim that the statute of conviction, 18 U.S.C. 2423(b) (2000 & Supp.

III 2003), was unconstitutional as applied to petitioner because it penalized mere thought and burdened his constitutional right to travel. Relying on circuit precedent, the court held that the statute did not punish mere thought, but rather the act of crossing the state line with the intent to engage in specified wrongful conduct. The court observed that the acts here included petitioner's "repeated correspondence with his intended paramour, his setting up the details of the assignation, his bringing of the condoms, and his actual traveling to the general vicinity of the rendezvous point, on the scheduled date and at the scheduled time." Pet. App. A7. Thus, the court concluded, petitioner did "much more" than "abstractly contemplate crossing state boundaries with a thought to committing a crime upon reaching his destination." *Ibid.* The court further held that the statute did not impermissibly burden petitioner's right to travel because it only criminalized travel done with an illegal intent. *Ibid.* At bottom, the court concluded, petitioner's constitutional claims were "nothing more than an attack on the sufficiency of the evidence." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the government should have to disprove the affirmative defense of abandonment beyond a reasonable doubt, and that the court of appeals erred in concluding otherwise. This contention is without merit and does not warrant further review.

a. Petitioner's requested instruction was based on the Model Penal Code's suggestion of renunciation, or abandonment, as an affirmative defense to attempt crimes. See Model Penal Code § 5.01(4) (Official Draft & Revised Comments 1985) ("When the actor's conduct

would otherwise constitute an attempt * * * it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."). As the court below noted (Pet. App. 10a), however, no federal court has expressly held that abandonment constitutes a defense to an attempt crime. See *United States* v. *Crowley*, 318 F.3d 401, 410-411 (2d Cir.) (declining to decide whether abandonment is a viable defense to an attempt crime, because defendant did not seek such an instruction or raise the issue on appeal), cert. denied, 540 U.S. 894 (2003); *United States* v. *Adams*, 214 F.3d 724, 728 (6th Cir. 2000) (observing that, "[o]nce a defendant takes a 'substantial step' towards the completion of the crime * * * abandonment of the crime is not a defense"); *United States* v. *Shelton*, 30 F.3d 702, 706 (6th Cir. 1994) (declining to follow the approach of Model Penal Code and holding that "withdrawal, abandonment and renunciation * * * do not provide a defense to an attempt crime"); *United States* v. *Dworken*, 855 F.2d 12, 20 (1st Cir. 1988) (noting that it had "never firmly adopted or rejected" the defense of abandonment and holding that, assuming arguendo such a defense, it failed as an evidentiary matter); *United States* v. *Bailey*, 834 F.2d 218, 227 & n.7 (1st Cir. 1987) ("express[ing] no view [on] whether abandonment is a viable defense" to a charge of endeavoring to influence a jury, and affirming trial court's refusal to instruct on the defense because it was not supported by the evidence); *United States* v. *McDowell*, 705 F.2d 426, 428 (11th Cir. 1983) ("[a]ssuming renunciation is a valid defense under the proper circumstances," but rejecting the defense on the facts of the case); *United States* v. *Bussey*, 507 F.2d 1096, 1098

(9th Cir. 1974) (rejecting abandonment defense to attempted robbery and observing that "[a] voluntary abandonment of an attempt which has proceeded well beyond preparation as here, will not bar a conviction for the attempt").

Whatever the merit of such a defense with respect to an attempt crime, the abandonment defense has no application to the completed crime with which petitioner was charged. Section 2423(b) of Title 18 criminalizes interstate travel "for the purpose of engaging in illicit sexual activity." That crime was complete when petitioner crossed state lines with the requisite intent to engage in sex with a person younger than 18. The Model Penal Code's proposed defense for attempt crimes thus has no application here.

b. Review is unwarranted for the further reason that petitioner was not entitled to a jury instruction on his putative defense, even if it existed in federal law. Although "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," *Mathews* v. *United States*, 485 U.S. 58, 63 (1988), an affirmative defense should be submitted to a jury only if evidence of each element of the defense is adduced at trial, see *Bailey* v. *United States*, 444 U.S. 394, 415 (1980).

The evidence in this case did not warrant an abandonment instruction. As the district court correctly recognized (C.A. App. 44-45), petitioner's evidence at trial was not that he abandoned at some point in time his attempt to have sexual relations with "baybeedawl88," but that he did not travel interstate for the purpose of having illicit sexual relations with her. As the district court noted, this evidence, if believed, would have supported

the conclusion that petitioner did not commit the crime at all. It would not show that he set out to commit the crime but then abandoned his efforts. See *id.* at 44-45 ("[Petitioner] testified in a manner that is inconsistent with the renunciation defense. * * * I don't believe any reason [sic] jury could, given these facts, given [petitioner's] testimony, find him not guilty based upon a renunciation theory. He has a viable theory of defense but it's not renunciation.").

c. In any event, the courts below correctly concluded that petitioner should bear the burden of persuasion on his affirmative defense of abandonment. See Pet. App. A11-A12; C.A. App. 50-52. First, the defendant is far more likely than the prosecution to be in possession of information bearing on the defense of abandonment. There would thus be no unfairness to him in requiring him to shoulder the burden of establishing the defense. Second, Congress has provided a statutory affirmative defense to a Section 2423 charge—a reasonable belief that the person with whom the defendant engaged in the illicit sex act was 18 years or older—and expressly placed the burden on the defendant to establish that defense by a preponderance of the evidence. 18 U.S.C. 2423(g) (Supp. III 2003). As the court of appeals observed, it would be "inconsistent to alter this allocation of burdens for an affirmative defense not even recognized by the statute." Pet. App. A11. Finally, although the government bore the burden of proving beyond a reasonable doubt that petitioner crossed state lines with the intent required by the statute, there is no constitutional impediment to placing on petitioner the burden of persuasion on the affirmative defense of abandonment. This Court has settled that the reasonable doubt standard applies to the elements of an offense as

defined by the legislature, not to affirmative defenses. See *Martin* v. *Ohio*, 480 U.S. 228 (1987); *Patterson* v. *New York*, 432 U.S. 197 (1977).

Although petitioner claims (Pet. 5-9) that there is a conflict in the circuits with respect to the placement of the burden of persuasion on affirmative defenses generally, there is no conflict with respect to an abandonment defense. As noted above, no federal court has expressly recognized the defense, much less placed the burden of persuasion of disproving it on the government. There is thus no conflict on the issue warranting this Court's review.

Nor is there any reason to hold this case for *Dixon* v. *United States*, cert. granted, No. 05-7053 (Jan. 13, 2006). *Dixon* presents the question whether the government or the defendant bears the burden of persuasion on the affirmative defense of duress—an issue on which the circuits are divided. Not only is there no conflict on the abandonment issue, but for the multiple reasons given above, petitioner would not benefit even if *Dixon* were to provide some support for placing the burden to disprove abandonment on the government. Review should therefore be denied on this issue.

2. Petitioner also contends (Pet. 9-10) that 18 U.S.C. 2423(b) (2000 & Supp. III 2003) is unconstitutional as applied to him because it criminalizes mere thought. This claim is likewise without merit and also warrants no further review.

As the court of appeals correctly concluded, Section 2423(b) does not punish "mere thought," but rather the crossing of state lines for the purpose of engaging in illicit sexual conduct with a person under 18 years of age. While the government must establish the defendant's state of mind in order to prove the requisite crim-

inal intent, that does not mean that the statute criminalizes mere thought. See *United States* v. *Gamache*, 156 F.3d 1, 8 (1st Cir. 1998) ("Proof of intent naturally means proving state of mind, but that does not mean that one is punishing 'mere thought' any more than that the requirement of proving *mens rea* in most crimes means that one is solely punishing 'mere thought.'"). Nor did the statute as applied in this case punish mere thought on petitioner's part. The government proved that petitioner repeatedly corresponded with a person he believed to be 14 years of age: he engaged in sexually graphic conversation with her, set up an assignation, and promised to bring condoms. On the scheduled date and at the scheduled time, petitioner traveled interstate to the assignation point, bringing condoms with him. As evidenced by these actions on his part, petitioner plainly engaged in acts beyond mere thinking.

Every circuit to consider the issue has rejected the claim that, as applied to facts similar to those here, the statute in question criminalizes mere thought. *United States* v. *Bredimus*, 352 F.3d 200, 208-209 (5th Cir. 2003), cert. denied, 541 U.S. 1044 (2004); *United States* v. *Han*, 230 F.3d 560, 563 (2d Cir. 2000); *Gamache*, 156 F.3d at 7-8; cf. *Hoke & Economides* v. *United States*, 227 U.S. 308, 322-323 (1913) (upholding constitutionality of the Mann Act, ch. 395, 36 Stat. 825, which criminalizes transporting of any person in interstate commerce with intent that such individual engage in prostitution or any illegal sexual activity; "[m]otives executed by actions may make it the concern of Government to exert its powers").

Petitioner urges this Court (Pet. 10) to decide the question left open by the Second Circuit in *Han*, 230 F.3d at 563—namely, whether "a mere thought of en-

gaging in a sexual act with a person under 18 years of age, where coupled with crossing a state line, constitutes a prohibited act and thus a violation of § 2423(b)." The court in *Han* declined to decide that question because the defendant had engaged in acts beyond mere thinking: during telephone conversations he had formulated a plan and purpose to cross state lines for the purpose of engaging in sexual conduct with a minor. Thus, the *Han* court concluded, the defendant's crossing of state lines, when viewed in conjunction with all the evidence, showed that he had "take[n] steps sufficient to elevate his thoughts to an intention to commit the charged sexual acts with an underaged female." *Ibid.* As in *Han*, petitioner formed the requisite intent to engage in illicit sexual activity, took numerous steps to bring that plan to fruition, and crossed state lines with the purpose of engaging in illicit sexual activity. Accordingly, this case provides no occasion to decide the question left open in *Han*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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