IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 04-3277

Decided May 5, 2006

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

GEORGE PHILLIPS,

Defendant/Appellant.

APPEAL from a judgment of the United States District Court for the District of Gould. Before Gonda, Rosentrater, and Glousman. OPINION BY GLOUSMAN, J. Affirmed.

FACTUAL AND PROCEDURAL SUMMARY

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act ("PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003), including 18 U.S.C. § 2423(c) (Supp. 2006), making it a crime for a U.S. citizen or permanent resident to engage in any illicit sexual conduct with children in foreign places. The statute provides as follows: "Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both." 18 U.S.C. § 2423(c).

Section 2423(f) defines "illicit sexual conduct" as follows:

> 1) a sexual act (as defined in 18 U.S.C. § 2246) with a person under 18 years of age that would be in violation of chapter 109A [18 U.S.C. §§ 2241 *et seq.*] if the sexual act occurred in the special maritime and territorial jurisdiction of the United States;[1] or 2) any commercial sex act (as defined in 18 U.S.C. § 1591) with a person under 18 years of age.

A "commercial sex act" is defined as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(c)(1).

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[1] This part of the definition of illicit sexual conduct is not at issue on appeal. Although Phillips had sex with a minor, a statutory rape prosecution under chapter 109A would require that Natasha be sixteen, not seventeen, years old.

Defendant George Phillips, a 22-year-old U.S. citizen, was convicted of violating 18 U.S.C. § 2423(c), engaging in illicit sexual conduct in a foreign country with a person under 18 years of age.

Phillips was born in the United States and first moved to Holland to attend college, after taking a year off after high school to travel around the world. All of Phillips's living relatives are of Dutch descent and reside in Holland, including his parents, who moved to Holland after Phillips graduated from high school.

Last year, in March 2005, while Phillips was finishing his studies at a Dutch university, he decided to travel to Amsterdam for a long weekend. While at Amsterdam's famous Bulldog pub, Alexia Natasha, a Russian female, caught Phillips's eye. Phillips testified that after asking Natasha if she wanted a drink, she replied, "Well, since it's my seventeenth birthday, I'll let you get me a Jack and Coke. But just so you know, you're going to have to do much more than buy me a drink in order to impress me. I'll have you know, I'm very expensive."

Phillips testified on cross-examination that he suspected that Natasha was a prostitute because of the way she dressed and flirted, but he was not sure because she seemed innocent and not particularly street savvy. After a few minutes, Phillips asked Natasha if he could kiss her, but Natasha said she "was with

someone else." Realizing that Natasha would not go home with him that night, Phillips invited her to dinner at a fancy restaurant. Phillips testified that Natasha responded that she was available to have dinner with him the next evening. He then watched her leave the bar with a substantially older man who had been in the bathroom during their conversation.

During dinner the next night, Phillips and Natasha shared their life stories and their goals for the future. As they strolled along De Kalverstraat, Phillips bought Natasha a diamond bracelet she was eyeing in a store window. Phillips testified that minutes after he placed the bracelet around her wrist, Natasha saw her older brother watching her across the street. She appeared annoyed and told Phillips that her brother acted like a father by being overprotective and meddling in her business. As she left to go join her brother, she whispered that she would make it up to Phillips the following night, "especially if there are more things like the bracelet coming."

While touring the infamous canals on a dinner cruise the next evening, Phillips suggested that Natasha consider going to the United States with him after he finished college because he knew a quick way to make a lot of money there. That evening, Natasha invited Phillips to join her in a hotel room, and the two consummated the relationship. Afterward, Phillips gave Natashsa $25 U.S. dollars, "for cab fare," he testified.

Phillips returned to college the next day. Phillips conceded on cross-examination that he never saw or contacted Natasha again. Evidence at trial established that at the time of their encounter, Natasha had a prior citation for underage soliciting. After finishing college, Phillips returned to the United States, in May 2005.

Natasha's brother contacted both the Dutch government and U.S. Immigrations & Customs Enforcement (ICE). In an affidavit, he asserted that Phillips had engaged in illicit sexual conduct with his sister Alexia when she was only seventeen years old.

Holland had no interest in prosecuting Phillips. The ICE, however, referred the matter to the U.S. Attorney's Office for prosecution because Phillips's affair with Natasha constituted a commercial sex act under § 1591(c)(1) of the PROTECT Act. The federal government indicted Phillips for engaging in illicit sexual conduct in a foreign place, in violation of 18 U.S.C. § 2423(c). Shortly after the indictment, Phillips was brought to trial in the United States District Court for the District of Gould and was convicted by a federal jury. He was sentenced to two years in federal prison.

Phillips appeals the conviction on the ground that 18 U.S.C. § 2423(c), as applied to his affair with Natasha, is unconstitutional under Article I, Section 8, Clause 3 of the U.S. Constitution. Phillips claims that his conviction under §

2423(c) exceeds the scope of Congress's power to regulate "Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. Phillips acknowledges that he is a U.S. citizen.

DISCUSSION

Under Article I, Section 8, Clause 3 of the Constitution, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." At present, only one court has evaluated whether Congress had the authority to enact 18 U.S.C. § 2423(c) under its power to regulate commerce with foreign nations. See United States v. Clark, 435 F.3d 1100, 1116-17 (9th Cir. 2006) (holding that Congress did not exceed its authority by regulating foreign travel that resulted in sex with a minor).

We hold that 18 U.S.C. § 2423(c) is not unconstitutional as applied to Phillips's solicitation of an underage prostitute. Consistent with the majority in Clark, we believe it is unnecessary to import the three-prong analysis used in the domestic Commerce Clause context because Congress has broader power to regulate commerce with foreign nations than to regulate interstate commerce. 435 F.3d at 1114. Examining the application of the statute under rational basis scrutiny, we hold that Congress did not exceed the bounds of its authority because Phillips's sexual encounter involved both foreign travel and a commercial sex act. See Gonzales v. Raich, 125 S. Ct.

2195, 2208-09 (2005) (applying the rational basis standard to review the validity of "an individual application" of a medical marijuana statute under the Commerce Clause).

I. Appellant's Conviction Does Not Exceed Congress's Power Under the Foreign Commerce Clause

A. Congress's power to regulate commerce with foreign nations is broader than its power to regulate commerce among the several states

Courts have developed the following three categories of activity that Congress may regulate in interstate commerce: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) activities that substantially affect interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59 (1995) ("tricategory framework"). The Supreme Court has also stated, however, that "the [f]ounders intended the scope of . . . [Congress's] foreign commerce power to be . . . greater" than the scope of its power to regulate interstate commerce. Japan Line, Ltd. v. County of L.A., 441 U.S. 434, 446-48 (1979) (explaining that in the foreign context Congress is not restricted by considerations of federalism and state sovereignty). Because different concerns are at play in the international context, we follow the approach taken in Clark and do not find it necessary to determine in the foreign commerce

context whether § 2423(c) regulates one of the three traditional categories of commerce.

Applying the rational basis review used in "as applied" Commerce Clause cases, we find that 18 U.S.C. § 2423(c), as applied to Phillips's sexual encounter, is reasonably related to the legitimate purpose of diminishing child prostitution abroad. First, the rational nexus to Congress's foreign commerce power is evident given that Phillips's relocation to Holland from the United States constitutes "foreign travel" under § 2423(c). Second, Phillips clearly engaged in an illegal commercial sex act by buying Natasha food, alcohol, and expensive jewelry and giving her money in exchange for sex. This commercial sex act involved purchasing goods in the stream of commerce, and paying for Natasha's affections was itself commerce. Thus, the statute is not unconstitutional as applied to Phillips.

B. Even if we apply the tricategory framework used in the domestic Commerce Clause context, 18 U.S.C. § 2423(c), as applied, does not exceed the scope of Congress's foreign commerce power

Although we do not believe that the traditional domestic commerce analysis is required in the foreign commerce context, even by that standard Phillips's conviction was constitutional. Phillips's sexual encounter involved both foreign travel and a sex act that implicated commerce. Thus, Congress did not exceed

the bounds of its authority even under the traditional domestic commerce tricategory framework.

We acknowledge that Phillips's conduct did not involve an instrumentality, person, or thing "in" foreign commerce. Thus we begin our tricategory analysis by considering Congress's power over the use of the channels of interstate commerce. Congress's power to regulate the channels of commerce includes the right to keep those channels "free from immoral and injurious uses." Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 258 (1964).

1. Phillips used the channels of commerce to engage in illicit sexual conduct during foreign travel

Travel that results in illegal sexual conduct is well within Congress's reach under its authority to regulate the use of channels of commerce. United States v. Bredimus, 352 F.3d 200, 207-08 (5th Cir. 2003). While evaluating a related section of the PROTECT Act, 18 U.S.C. § 2423(b), the Fifth Circuit held that Congress has the authority to criminalize foreign travel "'for the purpose' of engaging in illicit sexual conduct." Id. Similarly, the Eleventh Circuit found that Congress has the authority to punish people who conspire to travel in foreign commerce with the intent to engage in sexual acts with minors. United States v. Hersh, 297 F.3d 1233, 1254 (11th Cir. 2002).

Congress's authority extends after travel across foreign borders has ceased. The Ninth Circuit held that Congress could prevent persons from retaining children abroad if they had initially used foreign channels to wrongfully remove the children from the United States. United States v. Cummings, 281 F.3d 1046, 1050 (9th Cir. 2002). Similarly, in United States v. Shahani-Jahromi, 286 F. Supp. 2d 723, 734 (E.D. Va. 2003), the court found that Congress had authority under its foreign commerce power to criminalize the wrongful retention of a child in a foreign country because the retention impeded that child's travel back to the United States through the channels of foreign commerce.

Here, if Phillips had never left American soil he would not have been able to engage in illicit sexual conduct with Natasha. Phillips's actions are necessarily tied to travel in foreign commerce, as required by 18 U.S.C. § 2423(c). Thus, § 2423(c) is a valid regulation of the channels of foreign commerce. Clark, 435 F.3d at 1116.

2. Phillips's sexual encounter substantially affected foreign commerce

Phillips's prosecution also satisfied the third of the traditional categories, activities that substantially affect interstate commerce. Factors considered in determining whether a regulated activity substantially affects commerce include the

statute's legislative purpose, whether there are congressional findings demonstrating the impact that the regulated activity has on commerce, whether the regulated activity is commercial or economic in nature, and whether there is a sufficient link or nexus between the prohibited activity and the effect on commerce. See, e.g., Lopez, 514 U.S. at 558-59; United States v. Morrison, 529 U.S. 598, 610-12 (2000); United States v. Adams, 343 F.3d 1024, 1028 (9th Cir. 2003).

Section 2423(c) is economic and commercial in nature. The statute in Raich was also a criminal statute, and it was found to have an economic component. 125 S. Ct. at 2211. Consequently, the Supreme Court found it constitutionally valid under Congress's commerce power. See id. (prohibition of intrastate growth and use of marijuana was rationally related to regulation of interstate commerce in marijuana).

As the court in Clark explained, § 2423(c) is "far from unique in using the Foreign Commerce Clause to regulate crimes with an economic facet." 435 F.3d at 1116; see, e.g., United States v. Kay, 359 F.3d 738, 741 (5th Cir. 2004) (discussing various instrumentalities of foreign commerce used to carry out a bribe in analyzing the crime under the Foreign Corrupt Practice Act). Like the statute regulating illicit drugs in Raich, the activity regulated by the commercial sex prong of §

2423(c) is economic and thus falls within Congress's foreign commerce power.

Phillips's sexual encounter with Natasha was economic in nature because it involved an exchange of sex for items of great value. All sexual encounters with children that involve some form of monetary payment are inherently economic transactions. Clark, 435 F.3d at 1115. Further, individuals who engage in illicit commercial sex acts with children abroad encourage the ongoing exploitation of impoverished children in foreign commerce. Cf. Adams, 343 F.3d at 1033 (holding that individuals who possess and view child pornography encourage its ongoing production and distribution in interstate commerce).

Here, in order to induce Natasha to sleep with him, Phillips plied her with food, alcohol, expensive jewelry, and money. Given that Phillips provided expensive goods in exchange for sex, his activity falls squarely within the statute's purview.

Further, even if a single commercial sex act with a child may have little effect on foreign commercial markets, Congress may prohibit such conduct based on the economic effect such conduct has in the aggregate. Wickard v. Filburn, 317 U.S. 111, 124 (1942). As the court explained in Adams, "Congress's Commerce Clause power may be exercised in individual cases without showing any specific effect upon . . . [foreign]

commerce, if in the aggregate the economic activity in question would represent a general practice subject to federal control." 343 F.3d at 1034.

Although Phillips's sexual encounter with Natasha may have had little effect on foreign commercial markets, the aggregate of similar activities has a substantial effect on foreign commerce. The exchange of material objects for sex involves purchasing legitimate objects for immoral and illegal purposes and encouraging minors to forgo legitimate educational or professional activities to pursue immoral and unhealthy (but economically desirable) activities. Thus, Phillips's activities substantially affected commerce.[2]

C. Conclusion

Under § 2423(c), the government must prove that a defendant traveled in foreign commerce and engaged in an illicit sex act with another person, which as applied in this context means a commercial sex act with a person under 18 years of age.

As applied to Phillips's sexual encounter with Natasha, Congress did not exceed its power under the foreign commerce clause. Like the defendant in Clark, whose travel in foreign

[2] Like Clark, we reject the argument that the PROTECT Act's extraterritorial application is unreasonable and unfair under principles of international law and the Due Process Clause of the Fifth Amendment. 435 F.3d at 1107-10. As a U.S. citizen, Phillips is subject to the laws of the United States, which in this case expressly allow for the prosecution of individuals committing criminal acts in foreign lands.

commerce was evident from the fact that he got on a plane and traveled from the United States to Cambodia, here, Phillips's "foreign travel" was evident from his relocation from the United States to Holland. Further, Phillips engaged in a "commercial sex act" with a minor given that in order to sleep with Natasha, Phillips gave Natasha alcoholic beverages, an expensive dinner, jewelry, and money. Because we find that Phillips both engaged in "foreign travel" and a "commercial sex act" with a minor, we find that Phillips's conviction under § 2423(c) was constitutionally valid. As applied, § 2423(c)'s regulation of commercial sex acts abroad is a valid exercise of Congress's foreign commerce power.

DISPOSITION

The judgment is affirmed.

ROSENTRATER, J., dissenting.

I respectfully dissent. Unlike the majority, I conclude that Phillips's conviction under the PROTECT Act exceeds Congress's authority under Article I, Section 8, Clause 3 of the U.S. Constitution. Further, I find that the court in United States v. Clark, 435 F.3d 1100, 1116-17 (9th Cir. 2006), whose holding the majority heavily relies on, incorrectly held that Congress acted within the scope of its authority under the foreign commerce clause in enacting 18 U.S.C. § 2423(c). The

majority, both here and in Clark, incorrectly replaced the tricategory framework used to help ascertain the outer limits of Congress's commerce power with a test that allows Congress to regulate "any activity with a bare economic component as long as the activity occur[ed] subsequent to some form of international travel." Id. at 1117 (Ferguson, J., dissenting).

A. The tricategory framework is appropriate in analyzing Congress's power to regulate foreign commerce

In United States v. Lopez, 514 U.S. 549, 565-66, 558-59 (1995), and United States v. Morrison, 529 U.S. 598, 608-09, 617 (2000), the Supreme Court announced a shift to a more constrained view of Congress's power over interstate commerce and outlined a three-category structure to analyze Congress's power under the Commerce Clause. See also Clark, 425 F.3d at 1112. That tricategory framework is also appropriate to analyze Congress's foreign commerce power given that the Constitution grants Congress the power to regulate foreign commerce and commerce among the states in parallel language. Saikrishna Prakash, Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity, 55 Ark. L. Rev. 1149, 1150 (2003) (explaining that the unified Commerce Clause theory is grounded on the intuitive norm of intrasentence uniformity); see also United States v. Cummings, 281 F.3d 1046, 1049 n.1. (9th Cir. 2002) (applying the analytical framework to the International

Parental Kidnapping Crime Act). Further, the tricategory framework is appropriate because it ensures that Congress does not exceed the outer bounds of its constitutional authority under the Commerce Clause. Morrison, 529 U.S. at 610-12.

B. Applying the long-established three-category framework, Congress exceeded its foreign commerce power

Under the three-category framework, Congress has the power to regulate 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) activities that substantially affect interstate commerce. Lopez, 514 U.S. at 558-59. Because the majority concedes that § 2423(c) is not aimed at the instrumentalities of commerce or persons or things in foreign commerce, the proper analysis is limited to a discussion of the remaining two categories articulated by the court in Lopez.

1. Section 2423(c) does not fall within Congress's authority to regulate the channels of foreign commerce

Congress's authority to regulate the channels of foreign commerce does not apply because Phillips's love affair was in no way tied to his foreign travel between the United States and

Holland. Phillips's affair occurred years after his foreign travel.

Further, under § 2423(c), unlike the other subsections of the statute, there is no requirement that a person have criminal intent during the course of his or her foreign travel. Without requiring that a person in some way intentionally abuse a channel of commerce, Congress cannot claim to have the power to enact 18 U.S.C. § 2423(c) under its authority to regulate the channels of foreign commerce. As the dissent in Clark explained, "The mere act of boarding an international flight, without more, is insufficient to bring . . . [any unrelated] downstream activity that involves an exchange of value within the ambit of Congress's Foreign Commerce power." 435 F.3d at 1120 (Ferguson, J., dissenting). Consequently, as applied, the statute lacks a sufficient connection to the channels of foreign commerce to bring it within the scope of Congress's foreign commerce power.

2. Phillips's love affair did not substantially affect foreign commerce

a. The legislative intent of 18 U.S.C. § 2423(c) is aimed at individual criminal conduct, not commerce with foreign nations

Courts have recognized that statutes regulating individual conduct do not implicate commerce or economic activity.

Morrison, 529 U.S. at 613. In Morrison, the Supreme Court concluded that a statute aimed at regulating gender-motivated crimes of violence is not in any sense aimed at regulating economic activity. Id. Similarly, in Lopez, the Supreme Court held that the statutory ban on firearm possession in a school zone was purely a criminal statute that had nothing to do with "commerce" or any sort of economic enterprise. 514 U.S. at 561.

The majority incorrectly relies on Gonzales v. Raich, 125 S. Ct. 2195 (2005), in holding that a statute with a criminal purpose is within Congress's commerce power as long as it has an economic component. As the dissent in Clark explained, "Raich is further distinguished by the fact that Congress's power to effectuate a comprehensive regulatory scheme was central . . . while no comparably general regulation of foreign commerce exists in this case." Clark, 435 F.3d at 1117 (Ferguson, J., dissenting).

Like the statutes in Lopez and Morrison, 18 U.S.C. § 2423(c) is simply a criminal statute. The purpose of § 2423(c) is "to make it a crime for a U.S. citizen to travel to another country and engage in illicit sexual conduct with minors." See H.R. Rep. No. 107-525 (2002). Thus, the statute is aimed at preventing the sexual exploitation of children abroad and not at regulating economic or commercial transactions with foreign nations, distinguishing it from Raich. Clark, 435 F.3d at 1120

(Ferguson, J., dissenting)(stating that § 2423(c) is a criminal statute that punishes private conduct that is fundamentally divorced from foreign commerce).

Section 2423(c) attempts to regulate all illicit sexual acts that U.S. citizens engage in while traveling abroad, noncommercial and commercial alike. Further, the definition of commercial sex act, i.e., "any sex act, on account of which anything of value is given to or received by any person," 18 U.S.C. § 1591(c)(1), improperly gives Congress the power to regulate sexual activity that may have no effect on foreign commerce. As the Supreme Court in Morrison implied, Congress may not regulate sexual activity that does not affect commerce with foreign nations based solely on the aggregate effect that gender-motivated violence has on international commercial markets. 529 U.S. at 613, 617-19.

Article I, Section 8, Clause 3 does not give Congress international police power, and without a sufficient nexus to foreign commerce, the criminal conduct cannot be said to substantially affect foreign commerce. Clark, 435 F.3d at 1117 (Ferguson, J., dissenting). In Clark, only two months had passed between the defendant's most recent transit between the United States and Cambodia. 435 F.3d at 1103. Although Clark held that 18 U.S.C. § 2423(c) does not require that the conduct occur while actually traveling in foreign commerce, the court

suggested that "a longer gap between the travel and the commercial sex act could trigger constitutional . . . concerns." Id. at 1111.

Here, Phillips's conduct is too attenuated to be sufficiently linked to foreign commerce because of the significant lapse in time between Phillips's travel from the United States to Holland and the incident in question. At the time of the incident, Phillips was a permanent resident of Holland. He had not traveled to the United States for several years, and aside from his citizenship, Phillips apparently maintained few ties to his country of origin.

Further, that Phillips was traveling within the country of Holland at the time of his love affair does not constitute "foreign travel" within the meaning of 18 U.S.C. § 2423(c). Both the holding in Clark and the legislative intent of the statute indicate that "foreign travel" was intended to mean travel between the United States and a foreign country. 435 F.3d at 1107. Hence, Phillips's relocation to Holland is too attenuated to be considered "foreign travel" for purposes of § 2423(c).

b. Dating does not qualify as an illicit commercial/economic activity

An activity that is utterly lacking in commercial or economic character has too attenuated a relationship to foreign

commerce to be subject to regulation under the Commerce Clause. United States v. Adams, 343 F.3d 1024, 1028 (9th Cir. 2003). For example, in United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003), the Ninth Circuit held that Congress lacked the power under the Commerce Clause to criminalize home-grown child pornography not intended for distribution or exchange because child pornography not intended for distribution or exchange was not commercial or economic in character. Thus, the court found that § 2423(b), as applied, was beyond the reach of Congress's power under the Commerce Clause. Id.

Here, like McCoy, Phillips's love affair with Natasha was not commercial or economic in nature. Phillips and Natasha were simply dating. Unlike prostitution, dating between two individuals does not entail an exchange of sex for money. Although Phillips gave Natasha material objects as a sign of his affection, the commercial activity he engaged in was collateral to his sexual relationship with Natasha. On the two encounters prior to his having sexual intercourse with Natasha, there is no indication that Phillips and Natasha did anything more than engage in intimate conversation.

C. Conclusion

Overall, the effect of Phillips's affair on international commerce was de minimis. Phillips's love affair with Natasha was an intimate act between two individuals that was consummated

after a three-day period, years after Phillips moved to Holland from the United States. Without a more substantial tie to foreign travel or evidence establishing that Phillips purchased jewelry, alcohol, and food only in exchange for a sexual act, Phillips's conduct does not substantially affect foreign commerce.

For the reasons stated above, I believe that Congress has exceeded its authority under the Foreign Commerce Clause in enacting 18 U.S.C. § 2423(c). I also believe that as applied to Phillips's love affair, the statute lacks a sufficient nexus to commerce with foreign nations. I therefore respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE

TWELFTH CIRCUIT

Case No. 04-3278

Decided June 21, 2006

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

GEORGE PHILLIPS,

Defendant/Appellant.

BEFORE TOWNES, KIMMELMAN, AND BENEDETTO

OPINION BY Townes, J.

I. FACTUAL AND PROCEDURAL BACKGROUND

Under 18 U.S.C § 112 (2000), violent attacks upon foreign officials are illegal. Section 112 states in relevant part:

> [w]hoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such

> person . . . or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both.

On Sunday, June 6, 2005, 21-year-old Dougie Mirabelli and his 14-year-old stepbrother, Jay Varitek, played soccer in a local Gould park with a group of boys from their neighborhood. Mirabelli and Varitek were in the United States only temporarily, as their mother was a foreign official in the United States for the nation of Redsawk. Mirabelli helped his parents by walking Varitek home from school and spending afternoons and Sundays with him.

Mirabelli usually insisted that Varitek play soccer in a separate group with younger boys, but that day he had allowed Varitek to play with him and his older friends on "the active roster." Defendant George Phillips, a newcomer to the neighborhood who had been playing soccer with the older group for a couple of weeks, was playing on the opposing team. Mirabelli and Phillips each fancied himself the best soccer player on the active roster and had developed a rivalry that increased in intensity with each game. After Mirabelli kicked an impressive goal to win yet another game, he taunted Phillips and made an unpleasant reference to a Russian woman that Phillips claimed he knew in Holland. As usual, the older boys laughed and also began taunting Phillips. Phillips headbutted Mirabelli in the abdomen, causing him to fall to the ground.

Phillips stood over Mirabelli and said, "I've had it with you. There's more where that came from. Just wait until tomorrow." After telling Varitek to "watch his back too," Phillips ran off the field, got into his car, which was blue, and sped away.

On Monday, June 7, Mirabelli met Varitek after classes let out at Fenway Public High School. They discussed the prior day's encounter with Phillips as they walked and dribbled basketballs down Yawkee Way. Varitek became very angry thinking about what Phillips had done to his stepbrother and bounced his basketball with particular force. The basketball bounced high into the air and landed in the middle of the street. Mirabelli looked both ways and then darted into the street to retrieve it. Immediately thereafter, Varitek noticed that a parked car suddenly accelerated into the street, heading southbound on Yawkee Way. The car struck Mirabelli before Varitek had an opportunity to warn him. The car did not stop and continued heading southbound.

Varitek ran out into the street and used all his strength to pull Mirabelli to safety on the sidewalk. Mirabelli was not bleeding, but he was unconscious and had suffered visible lacerations. Varitek called 911 on his cellular phone and told the dispatcher his location and that a "blue van" had struck his brother. He hung up immediately when he heard Mirabelli making noises and waited with his stepbrother until help arrived.

Just minutes after Varitek's phone call, paramedics reached the scene. While they secured Mirabelli on a stretcher, Varitek called his mother to tell her what had happened. She told him to stay where he was until law enforcement arrived.

Police Officer Gerri Ford reached the area two minutes after Varitek's phone call to his mother. She briefly questioned Mirabelli, who was now regaining consciousness, before the paramedics took him away in the ambulance. She conducted another five minutes of questioning with Crossing Guard Dawn Zimmer, who had slipped into her favorite doughnut shop at about the same time Mirabelli was hit. When Officer Ford approached Varitek, he was sitting on the sidewalk.

Officer Ford testified at trial that her conversation with Varitek went as follows:

Ford: What is going on here?

Varitek: A car came and hit my brother! A car came and hit my brother! It didn't stop. I couldn't yell at Dougie.

Ford: A car?

Varitek: Yes. A blue SUV. It was driving really, really fast. He swerved and hit Dougie.

Ford: Only one person was in the car?

Varitek: Yeah. It was a man. He was young. He looked like a man I played soccer with yesterday. I think he's living a couple doors down from me. I'm afraid that he's coming back to hurt me!

Ford: Which way did the car go?

Varitek: It went south. I'm kind of worried because he was driving so fast and there are a lot of schools in that direction.

Varitek spoke quickly but in a calm voice, and he pointed forcefully in the direction the car had driven. Officer Ford asked her partner, Officer Kevin Daley, to take Varitek home while she went to try to apprehend the individual in the blue sport utility vehicle. Ford knew that there were a number of elementary schools further south on Yawkee Way. Officer Daley asked if Varitek and his parents, who had since arrived on the scene, would accompany him to the stationhouse for further questioning about the incident.

Based on Varitek's descriptions, the police identified Phillips as the only suspect. Phillips was apprehended and arrested at a friend's home on Tuesday, June 8, 2005. Phillips was indicted by a federal grand jury on one count of assault on a foreign official[3] in violation of 18 U.S.C § 112, and he stood trial in the United States District Court for the District of Gould.

In its case-in-chief, the government sought to introduce the curbside statements made by Varitek to Officer Ford.

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[3] As defined by 18 U.S.C. § 1116(b)(3), "foreign official" includes "any member of his family whose presence in the United States is in connection with the presence of such officer or employee."

Phillips's counsel objected on hearsay and Confrontation Clause grounds. The government successfully established that Varitek was unavailable to testify at trial because he had returned to Redsawk with his father. It was unable to establish that Phillips's counsel had had an opportunity to cross-examine Varitek because Varitek and his father had left the country before any proceeding had occurred in the prosecution. The court allowed the statements into evidence after determining that they fell within the hearsay exception for "excited utterances" and that the statements were therefore nontestimonial in nature. Phillips was convicted and sentenced to three years in federal prison. Phillips appeals the trial court's decision to admit Varitek's statements to Officer Ford, arguing that they should have been excluded because they were testimonial in nature and, without his having had an opportunity to cross-examine Varitek, were inadmissible under the Sixth Amendment.

II. DISCUSSION

A. The Confrontation Clause of the Sixth Amendment

Under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, accused individuals have a right to confront witnesses against them in a criminal prosecution. U.S. Const. amend. VI. In Crawford v. Washington, 541 U.S. 36, 59 (2004), the Supreme Court, interpreting the Sixth Amendment,

ruled that testimonial hearsay is inadmissible unless the declarant is unavailable at trial and the accused had a prior opportunity to cross-examine the declarant. "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted. Fed. R. Evid. 803. Testimonial hearsay includes those statements "that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52.

B. The Hearsay Exception for "Excited Utterances"

Hearsay has historically been inadmissible except as provided by the Federal Rules of Evidence, rules prescribed by the Supreme Court pursuant to statutory authority, or by Act of Congress. Fed. R. Evid. 802. Federal Rule of Evidence 803(2) provides that an "excited utterance" is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and is not excluded by the hearsay rule. For a statement to qualify as an excited utterance, the following factors must be met: (1) a startling event occurred, (2) the declarant made the statement while under the stress of the excitement caused by the event, and (3) the declarant's statement relates to the

startling event. United States v. Alexander, 331 F.3d 116, 122 (D.C. Cir. 2003) (pre-Crawford).

Phillips conceded that the alleged events constituted a startling event and that Varitek's statements related to the startling event. We therefore confine our inquiry to the second factor: whether Varitek made his statement to Officer Ford while under the stress of the excitement caused by the event.

In determining whether a statement was made under the stress of excitement caused by the event, courts have examined a number of factors, including (1) the characteristics of the event; (2) the subject matter of the statement; (3) whether the statement was made in response to an inquiry; (4) the declarant's age; (5) the lapse of time between the declarant's statement and the startling event; and (6) the declarant's physical and mental condition. See, e.g., United States v. Brun, 416 F.3d 703, 707 (8th Cir. 2005) (commenting on the characteristics of the startling event, the subject matter of declarant's statements, and declarant's apparent mental condition in holding that declarant's statements were excited utterances); Alexander, 331 F.3d at 123 (observing that lapse of fifteen to twenty minutes between 911 phone call and startling event was not sufficient to render statement inadmissible). Some courts have also considered a declarant's tone of voice and whether the declarant had a motive to lie. See, e.g.,

Alexander, 331 F.3d at 124 (noting that defendant's strongest argument against the finding of an excited utterance was that declarant's tone of voice was "monotone and calm" at the time of the statement at issue).

In Brun, the court considered the declarant's mental and physical condition as well as the lapse of time between the declarant's statements and the startling event. 416 F.3d at 707. A woman called 911 and reported that her boyfriend had been at her house, was drunk, and had fired a rifle into her bathroom. Id. at 705. Approximately ten minutes later, a police officer arrived on the scene. Id. The declarant relayed the same story to the officer that she had told the police dispatcher, adding that her boyfriend had fired the rifle into the bathroom while she was in it. Id. The court found that her statements were excited utterances because she was "outwardly disturbed and crying" when the officer arrived on the scene, and her statements had been made in temporal proximity to the startling event. Id. at 707.

The Alexander court considered factors similar to those considered in Brun. 331 F.3d at 123-24. The declarant called 911 and told the dispatcher that the man she was dating had just threatened her at her workplace, said that he would return to "do something" to her, and said he was going to go to her apartment to "mess" it up. Id. at 120. The declarant informed

the dispatcher that her boyfriend had a gun and keys to her apartment. Id. When the dispatcher asked her if he had a gun at that moment, the declarant replied, "Yeah. And I need someone to go to my apartment [until] my mother come[s] [to] pick me up from work to meet me there." Id. The declarant called 911 approximately fifteen to twenty minutes after the alleged threats. Id. at 123. The court found that the declarant's statements to the 911 dispatcher were excited utterances. Id. at 124. The court pointed to the "relatively short lapse of time between those threats and the 911 call." Id. It noted further that a police officer who arrived on the scene fifteen minutes after the 911 phone call testified that the declarant appeared "stressed, afraid, [and] frightened." Id. at 120.

C. Excited Utterances and the Confrontation Clause

Since Crawford, some courts have held that whether a statement constitutes an excited utterance has no significance with regard to the testimonial inquiry. See, e.g., United States v. Arnold, 410 F.3d 895, 903 (6th Cir.) (holding that declarant could reasonably expect that statements could be used prosecutorially despite meeting excited utterance criteria and thus were inadmissible), opinion vacated & superseded by 434 F.3d 396 (6th Cir. 2005) (not reaching hearsay issue), reh'g en banc granted & judgment vacated (Mar. 2, 2006). These courts

focus instead on whether the statement was made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for later use at trial. See United States v. Brito, 427 F.3d 53, 60 (1st Cir. 2005) (analyzing this approach as taken by other courts), cert. denied, 126 S. Ct. 2983 (2006). The dissent follows this approach, and we believe, by doing so, minimizes facts that are essential to the determination of whether a given statement is testimonial.

Other courts follow the approach that the excited utterance inquiry and the testimonial inquiry are distinct but related. See, e.g., id. at 61 (conducting a separate inquiry while taking into account its conclusion that declarant's statement was an excited utterance); United States v. Hadley, 431 F.3d 484, 504-05 (6th Cir. 2005) (agreeing with Brito and acknowledging an overlap between the excited utterance and "testimonial" inquiries). Following this approach, a court first determines whether a particular hearsay statement qualifies as an excited utterance and ends its inquiry if it does not. If the statement does qualify, the court then looks to the surrounding circumstances to determine whether the statement might nonetheless be testimonial. This approach ignores the common-sense conclusion that can be drawn from the classification of a statement as an excited utterance, namely, that the nature and

context of such a statement obviate the possibility that the declarant would have had the presence of mind to anticipate that the statement might be used prosecutorially.

We reject both of the approaches outlined because we believe that by following them a court engages in unnecessary analysis.

Some courts follow the approach that excited utterances do not constitute testimonial hearsay. See, e.g., Brun, 416 F.3d at 707. These courts reason that, by definition, an excited utterance is made under the influence of a startling event, and therefore the declarant acts in response to that event rather than in anticipation that the statement would be available for later use at trial. See Brito, 427 F.3d at 60 (analyzing this approach as taken by other courts).

We believe this approach to be the correct one, and following it in the instant case, we find that Varitek's statements to Officer Ford constitute excited utterances and, accordingly, do not constitute testimonial hearsay.[4]

[4] In the recently decided case of Davis v. Washington, 126 S. Ct. 2266, 2272 (2006), the U.S. Supreme Court ignored whether a statement was an excited utterance and instead focused on whether an interrogation's primary purpose was to elicit facts relevant to criminal prosecution (testimonial) or to enable police assistance in an ongoing emergency (nontestimonial). Given that the Court did not discuss or expressly overrule the cases relied upon in our majority opinion, we believe that Davis is not inconsistent with our legal analysis and holding in this matter.

Like the woman in Brun, Varitek was visibly distraught when Officer Ford arrived on the scene. He spoke quickly when answering her questions and used an excited gesture. As was the case in Alexander, there was a relatively short lapse of time between the startling event and the statements made by Varitek to Officer Ford. Additionally, Varitek is an adolescent. His age suggests that in the context of the startling situation it was more likely that his statements would have been emotional and spontaneous rather than deliberate and reflective.

D. Conclusion

These findings indicate that Varitek's statements qualified as "excited utterances" and that he therefore did not reasonably believe that they would be available for use at a later trial. Accordingly, the district court did not violate the Crawford rule by admitting Varitek's statements in the absence of an opportunity for Phillips's counsel to cross-examine him because his statements to Officer Ford did not constitute testimonial hearsay.

AFFIRMED.

BENEDETTO, J., dissenting.

I respectfully dissent. By disposing of the "testimonial" inquiry with its conclusion that Varitek's statements were

excited utterances, the majority ignores a significant amount of jurisprudence in this area, including a U.S. Supreme Court decision, and neglects to focus upon the ultimate question with regard to the classification of Varitek's statements as testimonial hearsay: whether he could have reasonably expected that the statements he made to Officer Ford would be used prosecutorially. A statement's classification as an "excited utterance" should have no significance in the determination of whether a particular statement is testimonial.

A. The Sixth Amendment

In Crawford v. Washington, 541 U.S. 36, 68 (2004), the U.S. Supreme Court ruled that out-of-court statements that are "testimonial" and made by a witness not present at trial are admissible only if the declarant is unavailable and the defendant had a prior opportunity to cross-examine. The Sixth Amendment "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." Id. Therefore, "Crawford requires exclusion of some hearsay statements that previously were admissible under hearsay exception rules." United States v. Arnold, 410 F.3d 895, 902 (6th Cir. 2005) (referring to Jack B. Weinstein et al., *Weinstein's Federal Evidence* § 802.05 (3)(e) (2d ed. 2004)), opinion vacated & superseded by 434 F.3d

396 (6th Cir. 2005) (not reaching hearsay issue), reh'g en banc granted & judgment vacated (Mar. 2, 2006).

B. Testimonial Hearsay

As the majority notes, hearsay consisting of "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" constitutes testimonial hearsay. Crawford, 541 U.S. at 52. What the majority fails to point out, however, is that the Crawford Court held that "interrogations by law enforcement officers fall squarely within" the class of testimonial hearsay. Id. at 53. The Court refused to define the term but noted that it was used in its "colloquial, rather than any technical, legal, sense." Id. The Court went on to note that a statement "knowingly given in response to structured police questioning qualifies under any conceivable definition" of interrogation. Id.

In Davis v. Washington, 126 S. Ct. 2266, 2272 (2006), the U.S. Supreme Court focused its testimonial hearsay analysis upon the context of the questioning that elicited a statement rather than on whether the statement was an excited utterance. Police responded to a reported domestic disturbance and found the wife alone on the porch appearing "somewhat frightened." Id. During the initial conversation with the police, the wife told them that nothing was wrong. Id. Outside the presence of her

husband, she later told an officer that she and her husband had been in a physical argument and that he had broken a number of items in their living room, thrown her down onto broken glass, and punched her twice in the chest. Id. The Court held the wife's statements to be testimonial, and therefore inadmissible, noting, "[i]t is clear from the circumstances that there was no emergency in progress . . . the officer questioning her was seeking to determine not what was happening but what had happened." Id. at 2269. Commenting further, the Court stated, "the statements recounted how potentially criminal past events began and progressed, and . . . took place some time after the events were over." Id.

C. Appropriate Legal Framework: Testimonial Hearsay Inquiry Is Independent Of Excited Utterance Inquiry

The approach of the majority grossly underestimates the power of the human mind and in so doing fails to address the crux of the "testimonial" inquiry. By disposing of the question whether the statements were testimonial in its determination that Varitek's statements were excited utterances, it fails to acknowledge that even if Varitek had still been under the stress of the excitement caused by the startling event when he made the statements, he could have maintained the presence of mind to realize that his statements might be used at a later trial. When considered within the context of Officer Ford's

questioning, it becomes undeniable that the statements were made under circumstances that would lead an objective witness reasonably to believe that the statements would be used prosecutorially.

Like the statements found to be testimonial in Davis, Varitek's statements were made after the emergency, not while the emergency was in progress. The nature and length of Ford's questioning make it clear that she was not trying to determine what was happening but rather what had happened. Similar to the questioning in Davis, Ford's inquiries were made some time after the events were over. Moreover, the nature of Varitek's responses to Ford's questioning indicates that he did indeed anticipate that they might be used at a later trial, such as his specific description of the vehicle. Varitek made his statements to Officer Ford, a government official, and these statements described criminal activity.

D. Conclusion

The specificity of Varitek's statements alone would be sufficient to classify them as testimonial hearsay. Other very significant details, however, also support this conclusion. They were not given in the context of an ongoing emergency and were made to a government official. As Crawford establishes, formal statements given to a government officer bear testimony in a way that a casual remark to a friend does not. Finally,

and most significantly, they were given in response to structured police questioning. And, as Crawford holds, "interrogations by law enforcement officers fall squarely within" the class of circumstances giving rise to testimonial hearsay. For the reasons stated above, the majority's conclusion that Varitek's statements were excited utterances lends no support to the testimonial determination. I therefore respectfully dissent.

IN THE SUPREME COURT OF THE UNITED STATES

October 2006 Term

No. 01-25

GEORGE PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following question presented by the petition:

1. Whether Congress exceeded its authority under Article I, Section 8, Clause 3 of the U.S. Constitution in enacting a statute that makes it a felony for a U.S. citizen who travels in "foreign commerce" to engage in an illegal commercial sex act with a minor.

IN THE
SUPREME COURT OF THE UNITED STATES

October 2006 Term

No. 01-26

GEORGE PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

The petition for writ of certiorari is granted, limited to consideration of the following question presented by the petition:

1. Whether a statement made to a police officer shortly after a startling event was inadmissible at trial under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution as "testimonial hearsay" when the declarant was unavailable and the defendant did not have an opportunity to cross-examine him.

IN THE
SUPREME COURT OF THE UNITED STATES

October 2006 Term

Nos. 01-25, 01-26

GEORGE PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

GEORGE PHILLIPS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Motion of the Petitioner to consolidate cases for oral argument granted, and a total of one hour granted for oral argument.