No. 09-5830

IN THE SUPREME COURT OF THE UNITED STATES

ARLAN DEAN KAUFMAN AND LINDA JOYCE KAUFMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied plain-error review under Rule 52(b) of the Federal Rules of Criminal Procedure in holding that petitioners failed to make a specific showing that they were prejudiced by the district court's order prohibiting petitioners from making direct eye contact with victim-witnesses at trial.

2. Whether the district court committed plain error in defining the terms "labor" and "services" in instructing the jury about the crimes of involuntary servitude and forced labor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 546 F.3d 1242. The sealed order of the district court (Pet. App. A31-A34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 2008. Petitions for rehearing were denied on March 25, 2009, and April 6, 2009 (Pet. App. A37, A38). On June 17, 2009, and June 25, 2009, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including August 7, 2009,

and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a five-week jury trial in the United States District Court for the District of Kansas, petitioner Dr. Arlan Dean Kaufman was convicted of 31 counts and petitioner Linda Joyce Kaufman was convicted of 30 counts growing out of their fraudulent and abusive operation of a residential care facility. Petitioners appealed, arguing that the district court's order instructing petitioners not to make eye contact with their alleged victims during trial prejudicially infringed their rights under the Confrontation Clause of the Sixth Amendment and that the district court delivered erroneous jury instructions on some of the involuntary servitude and forced labor counts against petitioners. The court of appeals rejected petitioners' claims and affirmed their convictions.

1. Petitioners, who are husband and wife, jointly owned and operated the Kaufman House Residential Care Treatment Center, an unlicensed group home for severely and chronically mentally ill adults. Pet. App. A7. From 1981 through late 2004 (when they were arrested by federal authorities), petitioners billed the government, insurance companies, and the families of Kaufman House residents for psychotherapy and nursing services that they claimed to provide to the residents. Ibid. During that time, petitioners' sole source of income was money derived from operations of the Kaufman House, including room and board payments, Medicaid

proceeds, Social Security benefits, and supplemental insurance payments. Ibid.

Petitioners' idea of "therapy" consisted of coercing the residents to engage in group sexual activities and manual labor in the nude on petitioners' farm. Pet. App. A5, A7-A9. Some of the residents were required to be nude while engaging in activities such as attending group therapy sessions, eating dinner, and watching television. Id. at A8. Beginning in the mid-1990s, petitioners required residents to perform manual labor around petitioners' farm while nude. Such labor included moving cement blocks, shoveling manure, and pulling up a tree stump. Ibid. Petitioners also required residents to engage in various forms of group sexual activity. Those activities included masturbation, touching and shaving each other's genitals, nude hula-hooping, and oral sex, as well as Dr. Kaufman's touching the residents' genitals. Id. at A8-A9.

Petitioners frequently filmed the residents' engaging in nude farm labor and group sexual activities, often "zoom[ing] in on the residents' genitals." Pet. App. A7-A8. Law enforcement agents seized 78 videotapes from petitioners' residence, "many of which contained graphic scenes of the residents engaging in sexual acts at the express direction of Dr. Kaufman, who was operating the camera." Id. at A7. The tapes demonstrate that Dr. Kaufman frequently directed residents to engage in particular sexual acts while being filmed and instructed residents about how to position

themselves so that their genitals could be seen by the camera. Id. at A8. The government presented expert testimony from two psychiatrists, a psychologist, and a social worker that there is no therapeutic justification for petitioners' telling residents to engage in the sexual activities depicted on the videotapes or to engage in manual labor in the nude. Ibid.

Petitioners employed multiple means of coercion to induce the residents to engage in nude farm work and to perform group sexual activities while being videotaped. Pet. App. A8-A9. For example, petitioners used and threatened to use physical force including beating and choking residents, using a stun gun on at least one resident, threatening to use the stun gun on other residents by demonstrating its use, and for up to months at a time confining residents to a seclusion room that had neither a bed nor a toilet. Ibid. Petitioners also threatened to send residents to other facilities that were more restrictive, threatened to institutionalize them, and claimed that residents owed them monetary debts that they were obligated to work off. Id. at A9.

2. Before the commencement of petitioners' trial, the district court extended the magistrate judge's prior order that petitioners refrain from having contact with their victims. Pet. App. A9-A10, A32. In conjunction with that decision, the district court ordered petitioners "to avoid eye contact with the victims * * * [t]o the extent possible" when in court. Id. at A32. The district court noted that its goal was to prevent petitioners from

"trying to influence or intimidate" the victims while they were testifying. Id. at A10, A32. Petitioners did not object to the district court's order. Id. at A11. Subsequently, during a recess in the midst of the government's case, the district court reiterated its no-eye-contact instruction after learning that there had been a "situation" involving contact between Dr. Kaufman and one of his victims during the trial. Id. at A10, A35.

The jury found both petitioners guilty of one count of conspiracy in violation of 18 U.S.C. 371; two counts of forced labor in violation of 18 U.S.C. 1589; three counts of involuntary servitude in violation of 18 U.S.C. 1584; 16 counts of health care fraud in violation of 18 U.S.C. 1347; and eight counts of mail fraud in violation of 18 U.S.C. 1341. Pet. App. A5. The jury also found Dr. Kaufman guilty of obstructing a Medicare audit in violation of 18 U.S.C. 1516. Ibid. In addition, the jury found that petitioners should forfeit $85,197.67 for the fraud crimes and should forfeit their houses and farm because those properties had facilitated the crimes of involuntary servitude and forced labor. Id. at A10. The district court sentenced Dr. Kaufman to a total of 360 months of imprisonment and Mrs. Kaufman to a total of 84 months of imprisonment. Id. at A6.

3. The court of appeals affirmed petitioners' convictions.[1] First, the court held that the district court's no-eye-contact order did not warrant reversal of petitioners' convictions. The court expressly declined to decide whether the order violated the Confrontation Clause, recognizing that, although the order "might * * * have been warranted[,]" the validity of the order was at least questionable because of the district court's failure to make "particularized findings" for each of the victim-witnesses. Pet. App. A15-A16. Instead, the court of appeals assumed the district court's order was both error and plain, and it proceeded to inquire whether petitioners had "established the prejudice required to obtain relief under the plain error analysis." Id. at A16.

The court of appeals concluded that petitioners had failed to carry their burden of establishing that they had suffered prejudice as a result of their inability to make eye contact with the victim-witnesses. Pet. App. A16-A18. The court reasoned that, unlike in Coy v. Iowa, 487 U.S. 1012 (1988), in which the victim-witnesses were separated from the defendant by an opaque screen, the no-eye-contact order in this case did not have any practical effect on petitioners' defense because it permitted petitioners and the victim-witnesses to observe each other, permitted the jury to observe both petitioners and witnesses, and did not limit the

[1] The government also cross-appealed Mrs. Kaufman's sentence, and the court of appeals vacated her sentence and remanded for resentencing. Pet. App. A25-A30. Mrs. Kaufman does not seek review of that ruling.

cross-examination of the victim-witnesses in any way. Id. at A16-A18. In addition, the court noted that Dr. Kaufman testified on his own behalf, thereby providing the jury with an additional means of testing the credibility of the victim-witnesses' testimony. Id. at A18.

The court acknowledged that petitioners "offered one possible scenario" in which the order might have affected the jury's perception of the evidence: petitioners hypothesized that, if a victim-witness had looked directly at petitioners while testifying and petitioners had looked away in order to comply with the court's order, the jury might have made a negative inference from petitioners' inability to return the witnesses' eye contact. Pet. App. A17. But the court concluded that it was equally plausible that jurors would have interpreted petitioners' returning the eye contact of testifying victims "as the effort of a guilty party to * * * intimidate a particularly vulnerable group of witnesses." Ibid. The court also noted the difficulty in speculating about potential harm from hypothesized looks that were not returned because the record does not reflect whether any victim-witnesses attempted to look directly at petitioners at all, let alone what jurors might have inferred from petitioners' reaction to such looks. Id. at A17-A18.

The court concluded that, because the jury had sufficient traditional means with which to evaluate the victim-witnesses' credibility, "the testimony of the residents need not be discounted

entirely in assessing whether the no-eye-contact order prejudiced" petitioners. Pet. App. A17. The court distinguished this case from cases such as Coy, in which the government had the burden of establishing that an error did not result in prejudice. Id. at A18. In this case, petitioners bear the burden of demonstrating that the presumed error did violate their substantial rights. Because any potential effect of the no-eye-contact order on the victims' testimony was purely speculative, the court of appeals concluded that petitioners had not carried their burden. Ibid.

The court of appeals also rejected petitioners' argument that the district court committed plain error when it defined "labor" and "services" in the jury instructions for the involuntary-servitude and forced-labor counts alleging that petitioners repeatedly coerced two female residents to perform sexually explicit acts on videotape. Pet. App. A18-A22.[2] The court emphasized that the instructions, to which petitioners did not object in the district court, defined "labor" and "services" in accordance with their "ordinary meaning." Id. at A20. The court also relied on this Court's cases recognizing that, because the

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[2] With respect to the two-forced labor charges at issue, the district court instructed the jury that "'labor' means the expenditure of physical or mental effort" while "'services' means conduct or performance that assists or benefits someone or something." Pet. App. A19. The district court did not separately define "labor" and "services" when instructing the jury on the involuntary-servitude counts at issue. Ibid. Consequently, the court of appeals and parties "assume[d]" that the jury applied the same definitions of "labor" and "service" in considering the involuntary-servitude charges. Ibid.

Thirteenth Amendment -- which the involuntary-servitude and forced-labor statutes implement -- was intended to abolish all forms of compulsory servitude and incidents of slavery, those statutes "apply to coerced acts other than work in an economic sense." Id. at A21 (quoting Bailey v. Alabama, 219 U.S. 219, 241 (1911)) (internal quotation marks omitted).

ARGUMENT

Petitioners renew their claims that, in conducting plain-error analysis of the district court's order to avoid eye contact with victim-witnesses, the court of appeals erred by considering the unconfronted testimony of those witnesses, and that the district court's instructions on the involuntary-servitude and forced-labor counts erroneously permitted conviction for the compulsion of acts that have no economic value. Because the court of appeals correctly rejected those claims and its decision is in harmony with the decisions of this Court and the other courts of appeals, further review is not warranted.

1. Petitioners urge this Court to review their Confrontation Clause challenge to the district court's no-eye-contact order because, they assert (Pet. 17), the court of appeals' disposition of that challenge "represents a marked departure" from this Court's decision in Coy v. Iowa, 487 U.S. 1012 (1988). Petitioners are incorrect.

Because petitioners did not object to the district court's no-eye-contact order, that ruling is subject to plain-error review

under Federal Rule of Criminal Procedure 52(b). In United States v. Olano, 507 U.S. 725, 732 (1993), this Court explained that Rule 52(b) requires defendants to demonstrate that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights"; even then, a reviewing court should correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. Accord Johnson v. United States, 520 U.S. 461, 466-467 (1997). In this case, the court of appeals declined to decide both whether the district court committed an error and whether any error was plain. Pet. App. A15-A16. Instead, the court assumed that the district court's no-eye-contact order constituted obvious error, but held that petitioners failed to demonstrate that prejudice resulted from that error. The court of appeals correctly stated that, in order to establish prejudice -- i.e., an effect on substantial rights -- petitioners had to show "a reasonable probability that, but for the error, the result of the proceeding would have been different." Id. at A11 (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).

Petitioners' primary contention before this Court is that the court of appeals erred by refusing in its prejudice analysis to ignore all of the testimony of the victim-witnesses. In support of their argument, petitioners rely on this Court's statement in Coy that the reviewing court's assessment of whether the Confrontation Clause violation in that case constituted harmless error should not

rely on the testimony of the un-confronted witness, but must be "determined on the basis of the remaining evidence." 487 U.S. at 1021-1022. The Court explained that an inquiry into "whether the witness' testimony would have been unchanged, or the jury's assessment unaltered * * * would obviously involve pure speculation." Ibid.

Normally, the inquiry into whether an error affected substantial rights is the same for both preserved error and for forfeited error, "with one important difference: it is the defendant rather than the Government who bears the burden of persuasion with regard to prejudice" when the error is forfeited. Olano, 507 U.S. at 734; see also Dominguez Benitez, 542 U.S. at 82 n.8. But the court of appeals rejected petitioners' suggestion that the harmless-error model articulated in Coy should be applied to the Rule 52(b) substantial-rights inquiry in this case because the Confrontation Clause error in Coy differed substantially from the alleged error here. In Coy, the witness was shielded from the defendant by a screen in the courtroom, thus preventing the complaining witness from viewing the defendant at all while testifying. 487 U.S. at 1020. In this case, no physical barrier prevented the victim-witnesses from looking at the defendants, and the harm from the order precluding eye contact by the defendants thus had a far more speculative impact on the witnesses. Pet. App. A16. In light of the more limited nature of the restriction here, the court of appeals concluded that "the testimony of the residents

need not be discarded entirely in assessing whether the no-eye-contact order prejudiced [petitioners]." Id. at A17. The court explained that the witnesses were required to testify live and in the presence of the defendants, affording the jury a full opportunity to assess the witnesses' demeanor and credibility in light of their reactions to the defendants' presence. Ibid.; cf. Coy, 487 U.S. at 1019 ("The Confrontation Clause does not, of course, compel the witness to fix his eyes on the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions."). The court of appeals' reasoning that the substantial-rights inquiry differs in this case from the harmless-error inquiry under Coy responds to the different nature and effect of the alleged violation, and it does not create a conflict with Coy.

The court of appeals held that petitioners failed to establish that entry of the no-eye-contact order "affected their substantial rights." Pet. App. A6-A7; see id. at A18. The court reasoned that the only potential practical effect of the district court's order -- petitioners' "downward glances during the residents' testimony" -- was "hypothe[tical] and unsupported by the record and did not "establish a reasonable probability" of a different outcome. Id. at A18. Petitioners do not even attempt to argue that such a speculative showing was sufficient to meet their burden. As the court of appeals correctly found, petitioners failed to establish prejudice because they did not make a specific showing that their

inability to make direct eye contact with victim-witnesses altered the outcome of their trial.

Even if petitioners were correct on the substantial-rights issue, the outcome would be the same, and this Court's review would not be warranted, because relief under the plain-error test requires that petitioners show that the error seriously affected the fairness, integrity, and public reputation of judicial proceedings. United States v. Cotton, 535 U.S. 625, 632-633 (2002) (assuming an effect on substantial rights, but finding relief unwarranted under the fourth prong of plain-error analysis); Johnson, 520 U.S. at 469 (same). "The fourth prong is meant to be applied on a case-specific and fact intensive basis." Puckett v. United States, 129 S. Ct. 1423, 1433 (2009). Rather than conducting such analysis based on a truncated record or without consideration of courtroom realities, the fourth prong of plain-error review of petitioners' forfeited claim takes into account the fairness of the trial as a whole. See ibid. ("We have emphasized that a 'per se' approach to plain error review is flawed." (quoting United States v. Young, 470 U.S. 1, 17 n.14 (1985)).

Here, petitioners cannot show that the alleged violation substantially impaired the fairness, integrity, or public reputation of judicial proceedings. As this Court stated in Coy, "the Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." 487 U.S.

at 1017 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987)). Petitioners do not contend that their ability to cross-examine the victim-witnesses was curtailed in any way. Nor can petitioners contest the fact that, unlike in Coy, they were permitted to sit with an unobstructed view of their accusers, albeit without eye contact. The victim-witnesses' testimony was imbued with all the traditional hallmarks of reliability: they testified live and under oath, with an unobstructed view between them, the jury, and petitioners, and they were subject to unrestricted cross-examination. See Maryland v. Craig, 497 U.S. 836, 846 (1990). And petitioners cannot dispute that it is solely a matter of speculation "whether the resident-witnesses attempted to look directly at [petitioners], whether [petitioners] looked away, and what inferences, if any, the jury drew from any of this." Pet. App. A18. In light of the substantial protection that petitioners enjoyed in exercising their right to challenge the witnesses' testimony, as well as the jury's opportunity to assess the witnesses' credibility, the speculative effects that petitioners fear are insufficient to justify setting aside the results of the trial on plain-error review.

In any case, petitioners do not even assert that the court of appeals' decision conflicts with the decision of any other court of appeals. Indeed, at least two other courts of appeals have refused to adopt the view that eye contact is an essential component of a

defendant's Sixth Amendment rights.[3] Under those circumstances, the court of appeals' first-impression decision that the alleged error did not rise to the level of reversible plain error does not merit this Court's review.

2. Petitioners also urge (Pet. 26) this Court to review whether the district court "improperly expanded the reach of the involuntary-servitude and forced-labor statutes to reach the compulsion of acts that are not economic in nature." Petitioners contend that they were wrongly convicted of subjecting two female residents to forced labor and involuntary servitude by repeatedly forcing the residents to perform sexually explicit acts on videotape. Specifically, petitioners argue that the district court erroneously defined the terms "labor" and "services" in the jury instructions so as to include some forms of labor and services that are not "economic in nature." Because petitioners did not object to the jury instructions in the district court, the court of appeals correctly reviewed their challenge for plain error. Fed. R. Crim. P. 52(b).

The court of appeals' holding that the district court's jury instructions on the meaning of the words "labor" and "services"

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[3] See Ellis v. United States, 313 F.3d 636, 639 (1st Cir. 2002) ("But a defendant does not have a constitutional right to force eye contact with his accuser * * * and we refuse to fashion a bright-line rule that the lack of such an opportunity, in and of itself, automatically translates into a constitutional violation."), cert. denied, 540 U.S. 839 (2003); Morales v. Artuz, 281 F.3d 55, 62 (2d Cir.), cert. denied, 537 U.S. 836 (2002).

were not plain error does not merit further review because it does not conflict with any decision from this Court or any other court of appeals, and because it is correct. Petitioner does not point to a single case from any court holding that the forced-labor and involuntary-servitude statutes are intended to prohibit only coerced labor that is economic in nature. That alone establishes that this case does not merit further review.

In any case, the court of appeals correctly held that the district court's jury instructions were an accurate statement of the law of forced labor and involuntary servitude. As petitioners themselves note (Pet. 29-30), the Thirteenth Amendment and the statutes that Congress passed to enforce it were intended to abolish all of the "badges and incidents" of slavery, including one person's coercing "the personal services" and "labor" of another. See Bailey v. Alabama, 219 U.S. 219, 241 (1911); see also Pollock v. Williams, 322 U.S. 4, 17-18 (1944). In instructing the jury on how to apply the involuntary-servitude and forced-labor laws, the district court merely gave the words "labor" and "services" their ordinary meaning, as the court of appeals found. Pet. App. A20. And, as the court of appeals noted, the compulsion of sexual acts and services was a traditional element of the compulsion inherent in slavery. Id. at A21 ("In our view, if an antebellum slave was relieved of the responsibility for harvesting cotton, brought into his master's house, directed to disrobe and then engage in the various acts performed by the Kaufman House residents on the

videotapes (e.g., masturbation and genital shaving), his or her condition could still fairly be described as one of involuntary servitude and forced labor.").

Further review is also unwarranted because there is no risk that petitioners were convicted of involuntary servitude and forced labor for coercing conduct that does not amount to work in the ordinary economic sense. The record unequivocally establishes that petitioners acquired property and services of value as a result of the coerced conduct at issue. Petitioners conceded in their opening brief in the court of appeals that "forcing a person to be an actor in an actual pornographic movie would no doubt be work of an economic nature." Pet. C.A. Br. 73, United States v. Kaufman, No. 06-3125 (10th Cir. filed Dec. 14, 2007). Petitioners' failure to market the pornographic films in which they compelled the residents to perform does not mean that the residents' coerced performances do not qualify as labor and services. Indeed, petitioners created and kept the videotapes in which the residents were forced to perform sexual acts so that petitioners could watch them. Gov't Exh. 116B, Part 3, 9:55, Video Clip 116-3; Trial Tr. 1236, 1750; see id. at 308-309. In that sense, the home-created films served as substitutes for films that petitioners might otherwise have had to procure on the market. In addition, petitioners apparently believed that the videotapes had value because they contacted a nudist colony in Florida and offered to

donate the tapes to its library. Trial Tr. 362, 365-366, 1263-1264; Video Clip 128-1; Gov't Exhs. 407, 408.

For all of these reasons, petitioners cannot establish that any omission from the jury instructions affected their substantial rights or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See Cotton, 535 U.S. at 631-633; Johnson, 520 U.S. at 466-470. Thus, even if review of petitioners' jury-instruction claim were otherwise warranted, this case would be an inappropriate vehicle because they cannot win relief under the plain-error rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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