No.

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

LEE ANDREW PAUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Virginia G. Villa
Counsel of Record

2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com

Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

This petition presents the following questions:

1. Whether the Eight Circuit's decision conflicts with the Supreme Court's opinion in *Burrage v. United States*, 134 S.Ct. 881 (2014), which held that when a criminal statute includes a causation element, the government must prove "but for" causation?

2. Whether 18 U.S.C. § 1591(a), which creates the substantive crime of Commercial Sex Trafficking, requires the government to prove that a commercial sex act occurred, as opposed to offenses charged under 18 U.S.C. § 1594(a) and (c), which create the inchoate crimes of attempt and conspiracy, and whether, if the statute is construed to exempt proof of a commercial sex act, does such reading seriously call into question its constitutionality as exceeding congressional authority granted by the Commerce Clause?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. None of the parties are corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes and Rules:

Miscellaneous:

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

LEE ANDREW PAUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Lee Andrew Paul, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceedings on March 22, 2018.

OPINIONS BELOW

The oral denial of Mr. Paul's Rule 29 Motion for Judgment of Acquittal (Erickson, J.) has not been reported and is reprinted in the attached Appendix C. The opinion of the United States Court of Appeals for the Eighth Circuit is published at 885 F.3d 1099 and is reproduced in the attached Appendix A.

JURISDICTION

Lee Andrew Paul stands convicted of three counts of Commercial Sex Trafficking by way of trial in the United States District Court for the District of Minnesota with judgment entered on September 22, 2016. He filed a timely notice of appeal. The United State Court of Appeals for the Eighth Circuit affirmed in a published opinion filed on March 22, 2018. See Appendix A. The Circuit denied a timely petition for rehearing and rehearing en banc on May 23, 2018. See Appx. B. Mr. Paul invokes the jurisdiction of this Court under 28 U.S.C. §1254(1) by filing this petition within 90 days of the denial of rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Art. I, sec. 8, cl. 3:

The Congress shall have Power …

***

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; … .

18 U.S.C. § 1591:

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),

knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act,

or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act,

shall be punished as provided in subsection (b).

***

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

***

(e) In this section:

***

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;
(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
(C) the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(5) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

.

STATEMENT OF THE CASE

Lee Andrew Paul went to trial on three counts of Commercial Sex Trafficking. A jury convicted him of all three counts. The United States District Court for the District of Minnesota exercised jurisdiction pursuant to 18 U.S.C. § 3231. He moved for a judgment of acquittal notwithstanding the verdict pursuant to Rule 29 of the Federal Rules of Criminal Procedure. In an oral ruling, the District Court denied the motion. *See* Appx. C. Mr. Paul appealed the denial of his motion for judgment of acquittal. The Eighth Circuit affirmed and later denied rehearing.

In ruling on Mr. Paul's appeal, the Eighth Circuit recounted the factual underpinning of the jury's verdicts. "Paul encountered victim A.S., then age nineteen, at a hotel in April 2013 and persuaded her to work for him as a prostitute, telling her the lifestyle was fun and she could make a lot of money." *United States v. Paul*, 885 F.3d 1099, 1102 (8th Cir. 2018), Appx. A4. Mr. Paul was precluded from informing the jury that A.S. previously worked as a prostitute. "A.S. placed advertisements for sex acts on Backpage.com; Paul rented hotel rooms where A.S. met customers who responded to the ads. Paul collected all the money A.S. received from customers. He bought A.S. food, alcohol, and drugs, and prohibited her from having a boyfriend or seeing men who were not customers." *Id.* The opinion does not mention that A.S. admitted that her preferred drug of choice was methamphetamine, but that Mr. Paul prohibited her from using that drug and only bought her marijuana.

"Government witness D.R. testified that, in May 2013, she was paying Paul to drive her to customers who responded to her Backpage.com ads. Paul traveled to Rochester, Minnesota with A.S. and D.R. and rented a motel room to see customers. While in Rochester, looking to recruit a new prostitute, Paul took D.R. to his cousin's home where they pilfered the phone number of victim Z.S., who Paul knew was having sex with his cousin. At Paul's direction, D.R. texted Z.S., inviting her to a party. Z.S. and her friend, victim K.J., met Paul and D.R. at a McDonald's." *Id.* At this point, the implied timing recounted in the opinion is a bit off, but the testimony was clear that the two girls left with D.R. and Mr. Paul soon after they arrived at the McDonalds. They went to a liquor store to buy vodka, which the girls had been drinking prior to meeting Paul and D.R. They then went to local hotel. "D.R. testified the girls looked young and admitted after they were high that Z.S. was twelve years old and K.J. was sixteen. Paul 'didn't really care' that the girls were so young." *Id.* At the hotel, Z.S. agreed to work for him as a prostitute. The opinion does not mention that Z.S. testified that she had worked as a prostitute for a marijuana dealer prior to meeting Paul.

"Paul then drove the group to the Twin Cities. He argued with A.S. along the way, yelling at her and 'getting in her face.' A frightened Z.S. decided she did not want to work for Paul and wanted to go home; she showed K.J. a text saying she was scared and asked K.J. not to leave her." *Id.* The opinion does not recount that Z.S. did not mention her change of mind to Paul. "In the Twin Cities, Paul took Z.S., K.J., and A.S. to a motel. He told K.J. he would make her a prostitute if she

performed a sex act with him; they performed oral sex on each other in his car." *Id.* The Circuit's opinion does not indicate that this was an illegal or non-consensual sex act, which is consistent with both Minnesota's age of consent law as well as the fact that K.J. testified that she had been performing oral sex on Paul at the Rochester hotel before they left, and that she had to beg and tell lies in order to be taken along to the hotel in the Twin Cities. "Paul and A.S. told K.J. she would prostitute for a customer, but the customer never showed up after the police arrived on an unrelated matter." *Id.,* Appx. A4-5. The opinion does not recount that there was no evidence of any communications made with any potential customer for K.J.'s services by anyone. Evidence of online ads and text messages was introduced where commercial sex acts actually occurred.

"Z.S. testified that Paul told her he would kill her and K.J. and 'leave [them] on the side of Minneapolis.' Paul drove the group to another motel, where he raped Z.S. while A.S. and K.J. stayed in the car. Back in the car, A.S. told Paul her mother would take A.S. back to her parents' house in Alexandria, Minnesota. Angry, Paul told A.S. to take K.J. and Z.S. with her, have them meet customers, and 'show them how to make money.'" *Id.*, Appx. A5.

At this point, the opinion recites that "K.J. called her mother on Z.S.'s phone… ." *Id.* K.J.'s testimony was unequivocal that her mother called her on Z.S.'s phone, looking for her. It was when A.S. discovered that K.J. was speaking with her mother that A.S. refused to take K.J. with her to Alexandria. It was upon A.S. and Z.S. leaving with A.S.'s parents that K.J. "went to the motel's front desk to call the

police, and encountered a plainclothes officer. A.S. alerted Paul, who fled. A.S. went to Alexandria with Z.S. and advertised Z.S. on Craigslist.com. Z.S. engaged in sex acts with two customers who responded to the ads. Text messages from Paul to Z.S. congratulated her on the first sex transaction, telling her, 'I see you catch on pretty fast that's good.' Paul texted A.S., telling her 'to stay off the road as much as possible because you really don't want to get pulled over while having a 12 year old in the car.'" *Id.* The opinion does not recount the travails encountered by Paul in getting from the hotel to A.S.'s home in Alexandria, nor A.S.'s testimony that, in leaving Paul in the Twin Cities, she resolved not to work with him anymore. It also did not recount her testimony that she helped Z.S. find customers because Z.S. wanted to make money or Z.S.'s testimony that she didn't want anything to do with Paul and that she kept all of the money she made through commercial sex acts. The opinion does recount that, "[w]hen Paul attempted to collect the money Z.S. made at A.S.'s home in Alexandria, A.S. refused. Law enforcement arrested Paul at A.S.'s home." *Id.* Paul passed by Z.S., who was outside, when he arrived and went into the house to speak with A.S. Although he was arrested outside of A.S.'s house, he never approached Z.S. personally to obtain money from her. Z.S. spent some of the money she earned buying marijuana, which she was smoking when Paul arrived at A.S.'s house. The police arrived at the house due to information Mr. Paul gave them in an encounter he had with police that same evening, and not due to anyone having called the police to A.S.'s house.

On appeal, Mr. Paul challenged the sufficiency of the evidence as to all three named victims. As to Z.S., Mr. Paul argued that he did not "cause" Z.S. to engage in any commercial sex act, as all of the sex acts in question occurred after A.S. and Z.S. left him. Neither named victim intended that he benefit from these commercial endeavors when they were occurring. Z.S. was never questioned as to why she engaged in the commercial sex acts, but from the context, it was clear that she wanted money to buy marijuana. In addressing this argument, the Eighth Circuit stated,

> The jury could reasonably find that Paul 'harbored' Z.S. or benefitted from a 'venture' with A.S. that harbored Z.S., knowing that fraud, force or coercion would be used to cause Z.S. to engage in commercial sex acts, or that Z.S. was under the age of fourteen and would be caused to engage in commercial sex acts. *See United States v. Jungers*, 702 F.3d 1066, 1074 n.6 (8th Cir.)(the TVPA 'reflects agnosticism…about who causes the child to engage in the commercial sex act"), *cert. denied*, 134 S.Ct. 167 (2013).

Paul, 885 F.3d, at 1103, Appx. A6. The Circuit does not illuminate the "benefit" Mr. Paul received from his association with A.S. after Z.S. joined them, as A.S. did not earn any money during this time period, nor did she ever intend to share any money with him. Z.S. did not testify that she performed any commercial sex act due to any threats or other acts perpetrated by Mr. Paul. She was safely removed from his presence by the time these acts occurred. Given the causal break indicated by A.S.'s having left Mr. Paul and returning home, which she testified she intended to be a permanent departure, the question arises as to what the word "causes" means in the context of 18 U.S.C. § 1591(a).

The issue of causation was also at the heart of his challenge to his conviction of having trafficked A.S., the nineteen year old. In affirming this conviction, the Circuit reasoned:

> Paul argues there was insufficient evidence to support his conviction on Count III because A.S.'s testimony was entirely silent as to any particular commercial sex act she would or would not have performed because of Paul's force, fraud, or coercion. A.S. testified that Paul repeatedly sexually assaulted her, pushed her around, slammed her head against a wall when she was with a man who was not a customer, took A.S.'s phone, ID, and money when she attempted to leave, and threatened to tell A.S.'s mother about her prostitution. The jury was entitled to credit A.S.'s testimony; credibility determinations are "uniquely within the province of the trier of fact." *United States v. Geddes*, 844 F.3d 983, 992 (8th Cir. 2017)(quotation omitted). Victim A.S.'s testimony was sufficient to permit a reasonable jury to find that Paul used force, fraud, or coercion to cause her to engage in a commercial sex act. See *United States v. Bell*, 761 F.3d 900, 907-08 (8th Cir.) cert. denied, ___ U.S. ___, 135 S.Ct. 503, 190 L.Ed.2d 378 (2014).

Paul, 885 F.3d, at 1103-1104, Appx. A7. The opinion took as proven that Paul did sexually assault A.S., which was based on her legal characterization of the encounters. However, her factual statements of what actually happened established that she consented to all sexual encounters with Paul, and when she communicated any withdrawal of consent, he stopped that sexual encounter. Further, she also testified to certain commercial sex acts in which she would refuse to engage, and which he did not require her to perform. She also left him on at least one occasion during their month-long relationship, with no violence perpetrated by Paul prior to or after her return. This equivocal evidence, coupled with an absence of evidence as to any particular commercial sex act A.S. would not have performed but for the force and coercion exercised by Paul, renders the legal question of causation important to the resolution of this case.

Mr. Paul argued that the evidence was insufficient as to K.J. as she never engaged in any commercial sex act and that he never took any substantial step that would have caused her to engage in a commercial sex act. Although he encouraged A.S. to take both Z.S. and K.J. to Alexandria with her, A.S. made an independent decision to leave K.J. behind. His agreement with A.S. to traffic K.J. at the first hotel may have been sufficient to prove a conspiracy, but Paul was not convicted of conspiring to traffic K.J. He was convicted of the substantive offense.

In affirming his conviction of having trafficked K.J., despite no commercial sex act having occurred, the Circuit reasoned:

> Congress chose the *future* tense — a choice that is inconsistent with the notion that a commercial sex act must already have happened before a violation can be shown. ...
>
> The more logical reading of the phrase "knowing ... the person ... will be caused to engage in a commercial sex act" is that it describes the acts that the defendant intends to take — that is, that he means to "cause" the minor to engage in commercial sex acts.

> *United States v. Wearing*, 865 F.3d 553, 556 (7th Cir.), cert. denied, … 138 S.Ct. 522 … (2017); accord *Jungers*, 702 F.3d 1073-74 ("[i]n many, if not all cases, the commercial sex act is still in the future at the time the purchaser entices, transports, obtains, or otherwise traffics a child in violation of § 1591"); *United States v. Brooks*, 610 F.3d 1186, 1197 n.4 (9th Cir. 2010). There was substantial evidence Paul "harbored" K.J. knowing that fraud, force, or coercion would be used to cause K.J. to engage in commercial sex acts, or that K.J. was under the age of eighteen and would be caused to engage in commercial sex acts.

Paul, 885 F.3d, at 1103, Appx. A6-7. Mr. Paul presented the question as to whether the government was required to prove a commercial sex act in order to obtain a substantive conviction in his opening brief. The question regarding the application of the doctrine of constitutional doubt arose during oral argument and Mr. Paul

expanded on this argument in his rehearing petition. These questions are appropriate for the Court's consideration.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS *BURRAGE V. UNITED STATES,* 134 S.CT. 881 (2014) REGARDING THE LEVEL OF PROOF NECESSARY TO SUSTAIN A CONVICTION IN WHICH THE STATUTE CONSTAINS A CAUSATION REQUIREMENT

Lee Andrew Paul acted as a pimp entirely within the State of Minnesota. He was not particularly successful, perhaps because he did not follow any strict rules regarding the prostitutes who worked with him. If he had traveled in interstate commerce with the intent to promote prostitution, the maximum penalty he could have received would have been ten years imprisonment. *See* 18 U.S.C. § 2421. The maximum penalty established by 18 U.S.C. § 1591 is life imprisonment. Mr. Paul received a sentence of 396 months. One of the questions presented is what the causality provisions contained in Section 1591 mean regarding a prosecutor's burden of proof.

Section 1591(a) proscribes any person from knowingly doing an enumerated list of acts (such as solicitation, transportation, or harboring) that either use the channels of interstate commerce or affect interstate commerce, when that person also knows that certain means (such as force or fraud) will be used "to cause the person to engage in a commercial sex act." *Id.* It also proscribes the same conduct in or affecting interstate commerce knowing that a person under the age of 18 "will

be caused to engage in a commercial sex act." *Id.* Congress could have proscribed the acts of force or fraud toward an individual "with intent that such individual engage in prostitution," which is the phrase contained in 18 U.S.C. § 2421(a)(proscribing interstate transportation for purposes of prostitution). Congress did not. It used the verb "to cause." It used it specifically in conjunction with the term "commercial sex act."

Given the structure of the statute, Mr. Paul appealed his convictions on the basis that he did not "cause" any of his victims to engage in commercial sex acts. He did so in reliance on the decision in *Burrage v. United States*, 134 S.Ct. 881 (2014). *Burrage* construed the "resulting in death" sentencing provisions contained in 21 U.S.C. § 841(b)(1)(A-C). The issue in *Burrage* was whether evidence that showed the controlled substance illegally distributed contributed to, but was not the sole cause of, the death of the purchaser was sufficient to meet the causation element implied by the "resulting in death" language contained in the statute. In finding that it was not, *Burrage* reasoned that "[t]he law has long considered causation a hybrid concept, consisting of two constituent parts: actual cause and legal cause. H. Hart & A. Honoré, Causation in the Law 104 (1959). When a crime requires 'not merely conduct but also a specified result of conduct,' a defendant generally may not be convicted unless his conduct is 'both (1) the actual cause, and (2) the `legal' cause (often called the `proximate cause') of the result.' 1 W. LaFave, Substantive Criminal Law § 6.4(a), pp. 464-466 (2d ed. 2003) (hereinafter LaFave); see also ALI, Model Penal Code § 2.03, p. 25 (1985)." Mr. Paul argued that his

actions were neither the actual, nor the legal, cause of the commercial sex acts performed by A.S. and Z.S.

Mr. Paul argued that the evidence was insufficient under this standard as to A.S. because, although the government presented evidence that Mr. Paul, at times, used physical force against A.S., it never elicited any evidence that tied this force to any specific commercial sex act performed by A.S. A.S. was not forced to perform sex acts she didn't wish to perform, such as anal sex. Force was not consistently used by Mr. Paul to control A.S. A.S. used methamphetamine. D.R. did not. Mr. Paul did not use force against D.R., who also was a prostitute who worked with him. When A.S. tired of being with Mr. Paul, she called her parents and went home. The Eighth Circuit rejected this argument on the basis that "A.S. testified that Paul repeatedly sexually assaulted her, pushed her around, slammed her head against a wall when she was with a man who was not a customer, took A.S.'s phone, ID, and money when she attempted to leave, and threatened to tell A.S.'s mother about her prostitution. The jury was entitled to credit A.S.'s testimony; credibility determinations are 'uniquely within the province of the trier of fact.'" *Paul*, 885 F.3d, at 1103-1104, Appx A7.

Relying on a credibility determination cannot account for the absence of any testimony by A.S. that she would not have any particular commercial sex act but for the "sexual assaults"[1] and physical abuse recounted by the Eighth Circuit. There is

[1] A.S. testified that all sexual encounters with Mr. Paul were consensual, in that she never told him "no", except for one instance, at which point he immediately stopped that particular sex act. Regardless of her factual statements regarding her

no question that Paul hit A.S. on at least one occasion during their one-month relationship or that he controlled her money. There is also no question that she left him at one point without physical repercussions and had the ability to pick up her phone, call her parents, and leave him. If Mr. Paul hit A.S. because she thought he was meeting her methamphetamine supplier and controlled her money so that she could not purchase methamphetamine, would this be sufficient to support a conviction under a "but-for" causation standard? If A.S. engaged in prostitution because she wanted to be able to smoke pot and drink vodka, which she could not do at home, would this be sufficient evidence to convict Mr. Paul of "causing" her to engage in commercial sex acts? Nothing on the record clarifies these issues, which is the heart of Mr. Paul's sufficiency argument. An absence of proof cannot be sustained through reference to a credibility determination where there is nothing on which to weigh credibility.

The same problem pertains to Z.S. She failed to testify that she would not have performed commercial sex acts while in the sole company of A.S. but for the prior influence of Mr. Paul. She initially agreed to work for him as a prostitute, but then changed her mind. She kept her money earned from the two commercial sex acts she performed and spent some of it on marijuana. She previously acted as a prostitute for a marijuana dealer. In ruling on the challenge to the conviction based on his contact with Z.S., the Eighth Circuit reasoned, "The jury could reasonably find that Paul 'harbored' Z.S. or benefitted from a 'venture' with A.S. that harbored

---

sexual relationship with Mr. Paul, she termed these encounters as "assaults," which is a legal definition in conflict with her testimony as to the facts.

Z.S., knowing that fraud, force or coercion would be used to cause Z.S. to engage in commercial sex acts, or that Z.S. was under the age of fourteen and would be caused to engage in commercial sex acts. *See United States v. Jungers*, 702 F.3d 1066, 1074 n.6 (8th Cir.)(the TVPA 'reflects agnosticism…about who causes the child to engage in the commercial sex act"), *cert. denied*, 134 S.Ct. 167 (2013)." *Paul*, 885 F.3d at 1103, Appx. A6. The Eighth Circuit does not illuminate the "benefit" Paul may have received from any "venture" engaged in with A.S. that "harbored" Z.S. Both A.S. and Z.S. testified they had no intention of sharing any of Z.S.'s prostitution remittances with Mr. Paul. A.S. explicitly told him as much prior to the arrival of the police and without knowing the police were going to arrive. Mr. Paul's actions may have been a contributing cause, but it does not appear, from the record, that it was the "but-for" cause.

The Eighth Circuit's construction of §1591(a) to hold that it "reflects agnosticism … about who causes the child to engage in the commercial sex act" *id.*, directly conflicts with *Burrage's* holding that a causality clause in the statute, in the case, linking a defendant's acts to a commercial sex act completed by a minor, "requires proof `that the harm would not have occurred' in the absence of — that is, but for — the defendant's conduct.'" 134 S.Ct., at 887-888, *quoting University of Tex. Southern Medical Center v. Nassar*, 133 S.Ct. 2517, 2525 (2013)(quoting Restatement of Torts § 431, Comment *a* (1934)). The Eighth Circuit did not follow this rule in deciding Mr. Paul's appeal. Given the strength of the rule, as set forth in *Burrage*, it would be appropriate for this Court to grant review to resolve the

meaning of the statute and to remedy any conflict the Eighth Circuit's decision creates with this Court's decision in *Burrage*.

II.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *JONES V. UNITED STATES*, 529 U.S. 848 (2000) IN THAT IT CONSTRUES 18 U.S.C. § 1591 IN A MANNER THAT SERIOUSLY CALLS INTO QUESTION ITS CONSTITUTIONALITY PURSUANT TO THE COMMERCE CLAUSE WHERE SUCH CONSTRUCTION IS NOT REQUIRED BY THE LANGUAGE OF THE STATUTE

Mr. Paul moved for a judgment of acquittal, arguing on appeal that the evidence failed because of a lack of proof that he, or someone working on his behalf, ever took a substantial step toward setting up a commercial sexual encounter between a customer and K.J. Mr. Paul partied with K.J. in a hotel room, he took her for a ride on a public highway, after which he propositioned her to become a prostitute. This all happened entirely within the State of Minnesota. There is no evidence that he, or anyone, used a communication device that crossed interstate lines to advertise K.J.'s services for commercial sex. There is no evidence that he, or anyone else, purchased any item that would make K.J. sexually alluring. There is no evidence that he, or anyone else, took any sexually suggestive photographic image of K.J. that could be used to place her services in the stream of commerce. There is no evidence that a potential customer for K.J.'s services was ever located using the channels of interstate commerce.

In affirming Mr. Paul's conviction in trafficking K.J., the Eighth Circuit held that the government need not prove that a commercial sex act ever occurred, or would ever occur, but rather that Mr. Paul knew that K.J., a minor, "will be caused"

to engage in a commercial sex act in the future. There remains a question as to how one could know that K.J. would be caused to engage in a commercial sex act where none of the affirmative steps needed to make such act a reality ever occurred.

This construction of 18 U.S.C. § 1591 has explicitly been adopted by a number of other courts. *See Wearing*, 865 F.3d, at 556 (adopting rationale of other courts that future tense used in § 1591 describes the defendant's plan for the victim at the time he recruits her); *Brooks*, 610 F.3d, at 1197 and n. 4 (affirming substantive conviction under § 1591 even though minor never engaged in commercial sex act as defendant knew of modus operandi that would have caused minor to engage in such act); *United States v. Mozie*, 752 F.3d 1271, 1286 (11th Cir. 2014)(accepting evidence that defendant recruited victims "to engage in commercial sex acts," even though those acts never materialized, as sufficient to support a section 1591 conviction); *United States v. Willowby*, 742 F.3d 229, 241 (6th Cir. 2014)(concluding that section 1591 offense was complete when defendant left victim at client's home knowing she would be caused to perform a sex act, and thus sentencing enhancement was not double counting); *United States v. Garcia-Gonzalez*, 714 F.3d 306, 312 (5th Cir. 2013)(reading section 1591 to require completed sex act as essential element "erases the meaning of `will be' from" the statute). This would seem to be an insuperable list of authority, but for the fact that the convictions in the cases listed above could have been sustained without construing § 1591 as requiring only an intent to cause a commercial sex act, rather than actually causing a commercial sex act.

What all of the fact patterns in the above cases share are that the defendants took a substantial step toward having a minor engage in a commercial sex act, or actual commercial sex acts occurred. In *Wearing*, the defendant twice "posted a Craigslist ad with her photo and twice tried to arrange a rendezvous with a client." 865 F.3d, at 554. In *Brooks*, the defendants purchased and dressed two minors in sexually provocative clothing, and one minor actually engaged in commercial sex acts. 610 F.3d, at 1197. In *Mozie*, the defendant kidnapped two minors and took them to a brothel, gave them application forms to complete that requested them to list the sex acts they would be willing to perform, and was preparing to take explicitly sexual photographs of them when they escaped. The defendant actually took explicit sexual photographs of a third minor, who escaped prior to engaging in commercial sex acts. 752 F.3d, at 1287. In *Willowby*, the minor engaged in a commercial sex act and the circuit only reached the question of the elements of the substantive crime in order to uphold a sentencing enhancement. Such enhancements may be appropriate even where the conduct is part of the substantive offense if Congress or the Sentencing Commission intended to impose multiple punishments to the same conduct, *see United States v. Wheeler*, 330 F.3d 407, 413 (6th Cir. 2003), and therefore the issue was not necessary to the circuit's decision. In *Garcia-Gonzalez*, the defendant smuggled underage females into the United States, bought them sexually suggestive clothing, had them work in his bar, and used his bar as a brothel. One of the three minors actually engaged in commercial sex acts. 714 F.3d, at 313.

By taking a substantial step toward making the minor engage in a commercial sex act a reality, the above defendants could have had their convictions affirmed under the auspices of the lesser included offense of attempted sex trafficking, in violation of 18 U.S.C. § 1594(a). An attempt is a lesser included offense of a substantive offense. *See United States v. Remigio*, 767 F.3d 730, 733 (10th Cir. 1985)(the "lesser included" designation comes from the idea that all completed crimes have necessarily been preceded by attempts to commit the crime, and that once the crime is complete, the attempt and the completed crime merge). When a jury convicts of the greater offense, but a court finds that the evidence is only sufficient for the lesser offense, it may amend the judgment to reflect the lesser offense without violating the Double Jeopardy Clause. *See Morris v. Matthews*, 475 U.S. 237, 246-247 (1986)("when a jeopardy-barred conviction is reduced to a conviction for a lesser included offense which is not jeopardy barred, the burden shifts to the defendant to demonstrate a reasonable probability that he would not have been convicted of the nonjeopardy-barred offense absent the presence of the jeopardy-barred offense). Given the factual nexus to a commercial sex act, the constitutional question did not arise in these prior cases. Neither is it apparent that appellants raised any issues of constitutional doubt in their appellate arguments.

The constitutional question arises here as the evidence was insufficient to establish that Mr. Paul took a "substantial step" toward having K.J. engage in a commercial sex act. He argued the evidence insufficient as to both the attempt and

the substantive crime and raised the issue of constitutional doubt in the Eighth Circuit.

The doctrine of constitutional doubt arises in this case due to the lack of a sufficient nexus to a commercial transaction if §1591 is read to allow a conviction where no commercial transaction was attempted. The terms "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits" § 1591(a), do not enumerate commercial activities. If the only transaction in evidence is one that normally accompanies private conduct, such reading seriously brings into question the statute's constitutionality pursuant to the holding in *Jones v. United States*, 529 U.S. 848 (2000). Basing federal criminal jurisdiction on driving one's own car entirely within a state would render federal criminal jurisdiction limitless.

Jones construed whether the arson of an owner-occupied residence not used for commercial purposes fell within the ambit of 18 U.S.C. § 844(i)'s proscription of the destruction by fire of any property used in any activity affecting interstate commerce. The government argued that § 844(i) reached the arson of an owner-occupied private because Congress used the term "affecting . . . commerce," "words that, when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause." *Jones*, 529 U.S., at 854. The Court rejected this argument based on the fact that Congress qualified interstate commerce with the "key word" "used". The structure of the statute required an inquiry as to the use of the structure itself, and not the structure's use of other items in interstate commerce.

See id. *Jones* also relied on the "the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Id.*, at 857. Such doctrine arose as, under

> the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce.

Id. The reading utilized by the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits also suffers from this same debility.[2] Further, such a reading is not required due to the language used in the statute.

As to the Commerce Clause issue, the first clause of § 1591(a) does cover anyone who knowingly "in or affecting interstate or foreign commerce … recruits entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person … ." Yet, this element depends that the accused also "knows" that "means of force, threats of force, fraud, [and/or] coercion … will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act … ." *Id.* The circuits which have addressed this language have held that the

[2] The non-existence of a split in authority does not doom a petition that relies on the language of a statute or rule that has uniformly been misinterpreted by the circuits. *See, e.g., Crosby v. United States*, 506 U.S. 255 (1993)(interpreting F.R.Cr.P. 43 to forbid trial in absentia where a defendant absconds prior to trial, where all circuits to have considered the matter had allowed trial to proceed).

future tense used by Congress means that no commercial act need ever have occurred. This is not the only reading required by the statutory language.

In *United States v. Todd*, 627 F.3d 329 (9th Cir. 2010), Judge Smith addressed the problem caused by congressional use of the future tense. In analyzing the statute, he reasoned that

> The phrase "will be used" in subsection (a) does not leave open the possibility that force, fraud, or coercion was not eventually used in committing the offense. Rather, it simply allows for a conviction even where the defendant did not personally use force, fraud, or coercion. In other words, a defendant will only be charged with violating the statute if force, fraud, or coercion was actually used at some point in commission of the offense. By using the phrase "will be used" as opposed to something more speculative such as "could be used" or "might be used," the statute describes definitive conduct.

Id., at 336. This definitive conduct also contains a causal phrase to other definitive conduct, namely a commercial sex act. As such, the future tense does not necessarily mean that no commercial sex act need ever occur, but rather that the proscribed means of causing a commercial sex act must be knowable. This interpretation is supported by provision in 18 U.S.C. § 1591(b)(1), which provides a certain mandatory minimum punishment if the crime "was effected by means of force, threats of force, fraud, or coercion … ." In Judge Smith's concurring opinion, "[h]ad force, fraud, or coercion not actually been used to cause the victim to engage in a commercial sex act, Todd could not have been prosecuted under 18 U.S.C. § 1591." *Id.*

Interpreting a violation of § 1591 creates a raft of problems. If the crime is recruiting, enticing, harboring, transporting, providing, obtaining, advertising,

maintaining, patronizing, or soliciting any person in or affecting interstate commerce, without any requirement that a commercial sex act ever be performed, federal criminal jurisdiction ceases to be connected to commerce, interstate or otherwise.[3] Given the technological age we live in, all phone calls involve channels of interstate commerce. All roads affect interstate commerce. All buildings use articles in interstate commerce. This need not be the result of the language in § 1591, because it specifically links the recruitment, etc., to a commercial sex act. For those instances in which the accused's conduct does not result in a commercial sex act, but does amount to a substantial step toward that goal, then it can be prosecuted as an attempt under § 1594(a). Where two or more people conspire to cause commercial sex acts by minors or by the use of fraud, force or coercion, that agreement can be prosecuted under 18 U.S.C. § 1594(c). It is unnecessary, and quite probably unconstitutional, to absolve the government from having to charge and prove that a commercial sex act occurred in order to prove a substantive violation of § 1591. Yet, that is exactly what the Eighth Circuit, joined by the Fifth, Sixth, Seventh, Ninth and Eleventh Circuits, have done. By so doing, they have undermined the determination in *Jones* that statutes should not be interpreted in a manner that destroys the limitation of federal criminal jurisdiction, and especially should not do so where the language of the statute does not command such result.

[3] This is so even in light of statutes such as 18 U.S.C . § 1958 (Interstate Travel for Purposes of Murder for Hire), in that such statutes require proof of a commercial agreement ("Murder for Hire"), even where no murder actually occurs.

CONCLUSION

For the foregoing reasons, Lee Andrew Paul requests this Court to grant review of the Eighth Circuit's decision in this appeal.

Dated: August 16, 2018

/s/ Virginia G. Villa

VIRGINIA G. VILLA
2689 230th Avenue
St. Croix Falls, WI 54024
(207) 745-6156
villa_virginia@hotmail.com
Attorney for Petitioner
Counsel of Record